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No. 2833

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE CITY OF PORT TOWNSEND, a Municipal Corporation,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK of CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY of PORT TOWNSEND,

Defendant.

Names and Addresses of Counsel.

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[1*]

*Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK of CENTRAL CITY,

Plaintiff,

vs.

THE CITY of PORT TOWNSEND,

Defendant.

Amended Complaint.

The plaintiff, by leave of the Court amending the complaint in the above-entitled action, for an amended complaint, shows that the matter in dispute in this action, exclusive of interest and costs, exceeds the amount of two thousand dollars; that the plaintiff is a banking corporation organized under the laws of the United States, and is located and doing business at Central City, State of Colorado; and the City of Port Townsend, defendant, is a municipal corporation, a city of the third class, in the County of Jefferson, State of Washington, and at all the times herein mentioned had and still has less than twenty thousand inhabitants.

The plaintiff further shows that an action to recover damages for breach of contract, number 1258 in the Superior Court for the County of Jefferson, State of Washington, wherein the Bank of British Columbia, a corporation organized under a Royal Charter from the United Kingdom of Great Britain, located

and having its place of business at Victoria in the Province of British Columbia, was plaintiff and the aforesaid City of Port Townsend was defendant, was at issue and pending on January 19, 1898. That the trial of said cause was then and there had by the Court without a jury, the trial thereof by a jury having been waived, and the decision of the Court duly given in writing, by which the Court found and decided that the defendant was indebted to the plaintiff in the sum of eighteen thousand, six hundred dollars and fifteen cents [2] ($18,600.15) and directed judgment to be entered therefor in favor of the plaintiff against the defendant; and on February 1, 1898, judgment was duly entered upon said finding and decision against the said defendant and in favor of said plaintiff for the sum of eighteen thousand six hundred dollars and fifteen cents and the costs and disbursements of the action.

The plaintiff further shows that, at a regular meeting of the City Council of said City of Port Townsend which commenced on the fifteenth day of February, 1898, and continued to and upon the sixteenth and seventeenth days of said February, the manner of paying said judgment, which remained in full force, unpaid and not appealed from was matter duly under consideration by said City Council; that the said City Council then and there proposed to the said Bank of British Columbia to pay the said judgment by the issue of warrants drawn on the indebtedness fund of said City for the amount thereof with interest and costs, drawing interest at the rate of six per cent per annum from date until paid; that said Bank of Brit-

ish Columbia then and there accepted and agreed to said proposal and the said City Council, pursuant to said proposal and acceptance thereof and also pursuant to the statute, at the same meeting duly ordered and directed that warrants be issued in usual form upon the indebtedness fund drawing interest at the rate of six per cent per annum from date until paid, for the satisfaction of said judgment.

The plaintiff further shows that on the 18th day of February, 1898, pursuant to the said proposal of the said City Council and acceptance thereof, the said order of the City Council and of the statutes relating thereto, the Mayor and City Clerk of said City duly issued thirty-eight warrants in form and of substance conforming to the said proposal, acceptance thereof and said order of said City Council, amounting together to eighteen thousand six hundred eighty-eight dollars [3] and fifteen cents ($18,688.15), the full amount of said judgment with the costs and interest. Each of said warrants was dated February 18, 1898, and stated that it was issued for part satisfaction of said judgment and given a distinguishing number in a series of one hundred and fifty-eight warrants which the defendant City on said 18th day of February 1898 drew on its indebtedness fund for the satisfaction of judgments which had theretofore been rendered against said City, which distinguishing numbers are the following viz: 3, 4, 5, 6, 7, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 101, 102, 103, 104, 105, 106, 115, 116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145, 146.

The plaintiff further shows that the warrants Nos.

116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145 and 146 were each issued payable to the above-named Bank of British Columbia or order; That on the 19th day of February, 1898, said last-mentioned warrants were each duly presented by said Bank of British Columbia to the Treasurer of the City of Port Townsend for payment and payment thereof demanded; that said Treasurer refused to pay the same for want of funds and then and there so endorsed upon the back of each said warrant. That thereafter the said Bank of British Columbia duly endorsed, assigned and transferred each of said last-mentioned sixteen warrants to this plaintiff, who, at the commencement of this action, was and still is the owner and holder of each and all of said sixteen warrants.

The plaintiff further shows that in the month of May, 1910 and before the commencement of this action it presented for payment each of said sixteen warrants to the treasurer of said City of Port Townsend at his office in said city and demanded the payment thereof and the said treasurer then and there refused to pay each and every of the said warrants.

The plaintiff further shows that the distinguishing numbers [4] and the amounts for which said one hundred and fifty-eight warrants were drawn are respectively as follows, viz:

No.	2, for	$1,548.12	No.	3, for	$500.00
"	4, "	500.00	"	5, "	500.00
"	6, "	500.00	"	7, "	308.15
"	8, "	247.58	"	9, "	487.00
"	10, "	96.30	"	11, "	500.00

"	12, "	250.00	"	13, "	250.00
"	14, "	250.00	"	15, "	250.00
"	16, "	500.00	"	17, "	500.00
"	18, "	500.00	"	19, "	500.00
"	20, "	500.00	"	21, "	500.00
"	22, "	500.00	"	23, "	500.00
"	24, "	500.00	"	25, "	500.00
"	26, "	500.00	"	27, "	250.00
"	28, "	250.00	"	29, "	500.00
"	30, "	500.00	"	31, "	500.00
"	32, "	500.00	"	33, "	500.00
"	34, "	500.00	"	35, "	500.00
"	36, "	500.00	"	37, "	500.00
"	38, "	500.00	"	39, "	500.00
"	40, "	500.00	"	41, "	500.00
"	42, "	500.00	"	43, "	500.00
"	44, "	500.00	"	45, "	250.00
"	46, "	125.00	"	47, "	20.00
"	48, "	605.00	"	49, "	500.00
"	50, "	440.00	"	51, "	600.00
"	52, "	600.00	"	53, "	250.00
"	54, "	250.00	"	55, "	250.00
"	56, "	250.00	"	57, "	247.30
"	58, "	252.70	"	59, "	250.00
"	60, "	250.00	"	61, "	500.00
"	62, "	500.00	"	63, "	500.00

[5]

"	64, "	120.00	"	65, "	500.00
"	66, "	500.00	"	67, "	500.00
"	68, "	500.00	"	69, "	500.00
"	70, "	500.00	"	71, "	500.00
"	72, "	500.00	"	73, "	500.00

"	74, "	500.00	"	75, "	500.00
"	76, "	500.00	"	77, "	500.00
"	78, "	500.00	"	79, "	525.00
"	80, "	25.00	"	81, "	25.00
"	82, "	25.00	"	83, "	25.00
"	84, "	25.00	"	85, "	25.00
"	86, "	25.00	"	87, "	25.00
"	88, "	25.00	"	89, "	250.00
"	90, "	500.00	"	91, "	500.00
"	92, "	500.00	"	93, "	308.25
"	94, "	691.75	"	95, "	500.00
"	96, "	500.00	"	97, "	500.00
"	98, "	500.00	"	99, "	250.00
"	100, "	250.00	"	101, "	500.00
"	102, "	500.00	"	103, "	500.00
"	104, "	500.00	"	105, "	500.00
"	106, "	500.00	"	107, "	500.00
"	108, "	500.00	"	109, "	500.00
"	110, "	500.00	"	111, "	500.00
"	112, "	500.00	"	113, "	500.00
"	114, "	500.00	"	115, "	500.00
"	116, "	500.00	"	117, "	500.00
"	118, "	500.00	"	119, "	500.00
"	120, "	500.00	"	121, "	500.00
"	122, "	500.00	"	123, "	500.00
"	124, "	500.00	"	125, "	500.00
"	126, "	500.00	"	127, "	500.00
"	128, "	500.00	"	129, "	500.00
"	130, "	500.00	"	131, "	500.00

[6]

"	132, "	500.00	"	133, "	500.00
"	134, "	434.57	"	135, "	525.53

"	136, "	15.18	"	137, "	420.00
"	138, "	500.00	"	139, "	471.00
"	140, "	373.44	"	141, "	607.30
"	142, "	500.00	"	143, "	500.00
"	144, "	500.00	"	145, "	500.00
"	146, "	380.00	"	147, "	500.00
"	148, "	236.50	"	149, "	500.00
"	150, "	263.50	"	151, "	500.00
"	152, "	500.00	"	153, "	500.00
"	154, "	500.00	"	155, "	500.00
"	156, "	500.00	"	157, "	500.00
"	158, "	500.00	"	159, "	309.30

Said warrants together amounting to sixty-seven thousand four hundred eighty-three dollars and forty-seven cents ($67,483.47).

The plaintiff further shows that the indebtedness of said City of Port Townsend, which at the time of the issue of the said one hundred and fifty-eight warrants was entitled to be paid out of money belonging to the indebtedness fund, before any money then in that fund or which should thereafter come into the same would be applicable to the payment of the said one hundred and fifty-eight warrants in numerical order, has been paid, except about three hundred dollars, all of which unpaid indebtedness was called in for payment prior to January, 1909.

The plaintiff further shows that the said City of Port Townsend has levied taxes for the payment of indebtedness from the indebtedness fund of said city as follows, viz:

In October, 1898, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00. [7]

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

In October, 1901, 1 55/100 mill on the dollar upon a property assessment of $1,067,932.00.

In October, 1902, 1 55/100 mill on the dollar upon a property assessment of $855,870.00.

In October, 1903, 1 55/100 mill on the dollar upon a property assessment of $869,973.00.

In October, 1904, 1 mill on the dollar upon a property assessment of $936,214.00.

In October, 1905, 1 mill on the dollar upon a property assessment of $960,967.00.

In October, 1906, 1 50/100 mill on the dollar upon a property assessment of $1,030,480.00.

In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00.

In October, 1908, 1 mill on the dollar upon a property assessment of $1,291,142.00.

And that said city has since last-mentioned levy neglected and omitted to levy any tax for the payment of indebtedness from the indebtedness fund.

The plaintiff further shows that the unpaid city taxes of the City of Port Townsend, which were made an asset of the indebtedness fund of said City by Section Seven of an Act of the Legislature of the State of Washington entitled, "An Act relating to the taxes and funds of Municipal Corporations having less than twenty thousand inhabitants," approved March 16, 1897, amounted to a large sum; that about the years 1902 and 1904, such portions of said unpaid

taxes as had not previously been collected or otherwise realized in money, became merged in the real estate upon which they were a charge, the title to which was acquired by the County of Jefferson, State of Washington, through the issue to said County of certificates of [8] delinquency against said real estate and proceedings to foreclose the tax liens embraced in such certificates of delinquency and the purchase of such real estate under said foreclosure proceedings, pursuant to the statutes.

The plaintiff further shows that the assets of the indebtedness fund of said City of Port Townsend now consist of:

a. Money which has been paid over to the Treasurer of said City by the Treasurer of the said County of Jefferson the collector of taxes for said city, which he had collected from the taxes so as aforesaid levied by said City for the payment of indebtedness out of the indebtedness fund, and not yet applied to the payment of such indebtedness, and money apportioned to said City as its share of the money derived by the said County of Jefferson from the sale by said County of parcels of the real estate, title to which said County of Jefferson acquired in the manner above stated, and not yet applied to the payment of indebtedness which was or is entitled to be paid from said indebtedness fund, which said moneys remaining unapplied as aforesaid, amount altogether to about the sum of ten thousand dollars.

b. Uncollected taxes levied as aforesaid by said City for the payment of indebtedness from said indebtedness fund not exceeding in amount the sum of

three hundred dollars, and the share which the said City of Port Townsend will be entitled to receive out of money which the said County of Jefferson may realize from the sale of the unsold parcels of real estate, title to which said County acquired in the manner above described, the total cash value of which unsold real estate is not above the sum of ten thousand dollars and the share of the said City of Port Townsend of the price for which it may be sold by said County will not be greater than one third thereof.

The plaintiff further shows that the aforementioned ten thousand dollars has accumulated in the hands of the City [9] Treasurer of said City by receiving smaller sums from time to time; that on March 1, 1910, the said accumulation was more than sufficient to pay in full, including the interest, the said warrant numbered 2; nevertheless, the said City Treasurer did not then, nor before, nor since, call in said warrant for payment, nor did he ever call in for payment any of the afore-mentioned warrants numbered 2 to 159, nor ever pay any thereof.

SECOND CAUSE OF ACTION.

For a second and separate cause of action the plaintiff shows to the Court that an action for damages for breach of contract, number 1538 in the Superior Court for the County of Jefferson, State of Washington, wherein the Manchester Savings Bank, which was a corporation incorporated and organized under the laws of the State of New Hampshire, was plaintiff, and the City of Port Townsend was defendant, was at issue and pending on January 20th, 1898.

That the trial of the said cause was then and there had by the Court without a jury, the trial thereof by a jury having been waived, and the decision of the Court duly given in writing, by which the Court found and decided that the plaintiff was entitled to judgment against the said defendant for the sum of seven thousand seven hundred eighty-eight dollars and seventy-one cents ($7,788.71) and the costs and disbursements to be taxed; which finding and decision was filed with the clerk on February 2d, 1898, and on the 5th day of February, 1898, judgment in favor of the plaintiff and against the defendant for the sum of seven thousand seven hundred eighty-eight dollars and seventy-one cents ($7,788.71) and that the said judgment should bear interest from date until paid at the rate of ten per cent per annum and that the plaintiff should also recover his costs and disbursements of the action to be taxed, was duly entered.

The plaintiff further shows that at a regular meeting of [10] the City Council of said City of Port Townsend which commenced on the fifteenth day of February, 1898, and continued to and upon the sixteenth and seventeenth days of said February, the manner of paying said judgment, which remained in full force, unpaid and not appealed from, was matter duly under consideration by said City Council that the said City Council then and there proposed to the said Manchester Savings Bank to pay the said judgment by the issue of warrants drawn on the indebtedness fund of said City for the amount thereof with interest and costs, drawing interest at the rate of six per cent per annum from date until paid; that said

Manchester Savings Bank then and there accepted and agreed to said proposal and the said City Council, pursuant to said proposal and acceptance thereof and also pursuant to the statute, at the same meeting duly ordered and directed that warrants be issued in usual form upon the indebtedness fund, drawing interest at the rate of six per cent per annum from date until paid, for the satisfaction of said judgment.

The plaintiff further shows that on the 18th day of February, 1898, pursuant to the said proposal of the said City Council and acceptance thereof, the said order of the City Council, and of the statutes relating thereto, the Mayor and City Clerk of said city duly issued nineteen warrants in form and of substance conforming to the said proposal, acceptance thereof and said order of said City Council, amounting together to seven thousand eight hundred and nine dollars and thirty cents ($7,809.30), the full amount of said judgment with the costs and interest. Each of said warrants was dated February 18, 1898, and stated that it was issued for part satisfaction of said judgment and given a distinguishing number in a series of one hundred and fifty-eight warrants which the defendant city, on said 18th day of February, 1898, drew on its indebtedness fund for the satisfaction of judgments which had theretofore **[11]** been rendered against said city, which distinguishing numbers are the following, viz: 20, 49, 59, 60, 99, 100, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159.

The plaintiff further shows that the warrants Nos. 49, 60, 100, 149, 150, 151, 152, 153, 154, 155, 156, 157,

158 and 159 were each issued payable to the above-named Manchester Saving Bank or order. That on the 18th day of February 1898, said last-mentioned warrants were each duly presented by said Manchester Savings Bank to the Treasurer of the City of Port Townsend for payment and payment thereof demanded; that said Treasurer refused to pay the same for want of funds and then and there so endorsed upon the back of each said warrant. That thereafter the said Manchester Savings Bank duly endorsed, assigned and transferred each of said fourteen last-mentioned warrants to this plaintiff, who at the commencement of this action, was and still is the owner and holder of each and all of said fourteen warrants.

The plaintiff further shows that in the month of May, 1910, and before the commencement of this action it presented for payment each of said fourteen warrants to the Treasurer of said City of Port Townsend at his office in said city and demanded the payment thereof and the said Treasurer then and there refused to pay each and every of said warrants.

The plaintiff further shows that the distinguishing numbers and the amounts for which said one hundred and fifty-eight warrants were drawn are respectively as follows, viz.:

No.	2, for	$1,548.12	No.	3, for	$500.00
"	4, "	500.00	"	5, "	500.00
"	6, "	500.00	"	7, "	308.15
"	8, "	247.58	"	9, "	487.00

"	10, "	96.30	"	11, "	500.00
"	12, "	250.00	"	13, "	250.00
"	14, "	250.00	"	15, "	250.00

[12]

"	16, "	500.00	"	17, "	500.00
"	18, "	500.00	"	19, "	500.00
"	20, "	500.00	"	21, "	500.00
"	22, "	500.00	"	23, "	500.00
"	24, "	500.00	"	25, "	500.00
"	26, "	500.00	"	27, "	250.00
"	28, "	250.00	"	29, "	500.00
"	30, "	500.00	"	31, "	500.00
"	32, "	500.00	"	33, "	500.00
"	34, "	500.00	"	35, "	500.00
"	36, "	500.00	"	37, "	500.00
"	38, "	500.00	"	39, "	500.00
"	40, "	500.00	"	41, "	500.00
"	42, "	500.00	"	43, "	500.00
"	44, "	500.00	"	45, "	250.00
"	46, "	125.00	"	47, "	20.00
"	48, "	605.00	"	49, "	500.00
"	50, "	440.00	"	51, "	600.00
"	52, "	600.00	"	53, "	250.00
"	54, "	250.00	"	55, "	250.00
"	56, "	250.00	"	57, "	247.30
"	58, "	252.70	"	59, "	250.00
"	60, "	250.00	"	61, "	500.00
"	62, "	500.00	"	63, "	500.00
"	64, "	120.00	"	65, "	500.00
"	66, "	500.00	"	67, "	500.00
"	68, "	500.00	"	69, "	500.00
"	70, "	500.00	"	71, "	500.00

"	72, "	500.00	"	73, "	500.00
"	74, "	500.00	"	75, "	500.00
"	76, "	500.00	"	77, "	500.00
"	78, "	500.00	"	79, "	25.00
"	80, "	25.00	"	81, "	25.00

[13]

"	82, "	25.00	"	83, "	25.00
"	84, "	25.00	"	85, "	25.00
"	86, "	25.00	"	87, "	25.00
"	88, "	25.00	"	89, "	250.00
"	90, "	500.00	"	91, "	500.00
"	92, "	500.00	"	93, "	308.25
"	94, "	691.75	"	95, "	500.00
"	96, "	500.00	"	97, "	500.00
"	98, "	500.00	"	99, "	250.00
"	100, "	250.00	"	101, "	500.00
"	102, "	500.00	"	103, "	500.00
"	104, "	500.00	"	105, "	500.00
"	106, "	500.00	"	107, "	500.00
"	108, "	500.00	"	109, "	500.00
"	110, "	500.00	"	111, "	500.00
"	112, "	500.00	"	113, "	500.00
"	114, "	500.00	"	115, "	500.00
"	116, "	500.00	"	117, "	500.00
"	118, "	500.00	"	119, "	500.00
"	120, "	500.00	"	121, "	500.00
"	122, "	500.00	"	123, "	500.00
"	124, "	500.00	"	125, "	500.00
"	126, "	500.00	"	127, "	500.00
"	128, "	500.00	"	129, "	500.00
"	130, "	500.00	"	131, "	500.00
"	132, "	500.00	"	133, "	500.00

" 134, "	434.57	" 135, "	525.53
" 136, "	15.18	" 137, "	420.00
" 138, "	500.00	" 139, "	471.00
" 140, "	373.44	" 141, "	607.30
" 142, "	500.00	" 143, "	500.00
" 144, "	500.00	" 145, "	500.00
" 146, "	380.00	" 147, "	500.00

[14]

" 148, "	236.50	" 149, "	500.00
" 150, "	263.50	" 151, "	500.00
" 152, "	500.00	" 153, "	500.00
" 154, "	500.00	" 155, "	500.00
" 156, "	500.00	" 157, "	500.00
" 158, "	500.00	" 159, "	309.30

Said warrants together amounting to sixty-seven thousand four hundred eighty-three dollars and forty-seven cents ($67,483.47).

The plaintiff further shows that the indebtedness of said City of Port Townsend, which at the time of the issue of the said one hundred and fifty-eight warrants was entitled to be paid out of money belonging to the indebtedness fund, before any money then in that fund or which should thereafter come into the same would be applicable to the payment of the said one hundred and fifty-eight warrants in numerical order, has been paid except about three hundred dollars, all of which unpaid indebtedness was called in for payment prior to January, 1909.

The plaintiff further shows that the said City of Port Townsend has levied taxes for the payment of indebtedness from the indebtedness fund of said city as follows, viz.:

In October, 1898, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

In October, 1901, 1 55/100 mill on the dollar upon a property assessment of $1,067,932.00.

In October, 1902, 1 55/100 mill on the dollar upon a property assessment of $855,870.00.

In October, 1903, 1 55/100 mill on the dollar upon a property assessment of $69,973.00. [15]

In October, 1904, 1 mill on the dollar upon a property assessment of $936,214.00.

In October, 1905, 1 mill on the dollar upon a property assessment of $960,967.00.

In October, 1906, 1 50/100 mill on the dollar upon a property assessment of $1,030,480.00.

In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00.

In October, 1908, 1 mill on the dollar upon a property assessment of $1,291,142.00.

And that said city has since said last-mentioned levy neglected and omitted to levy any tax for the payment of indebtedness from the indebtedness fund.

The plaintiff further shows that the unpaid city taxes of the City of Port Townsend, which were made an asset of the indebtedness fund of said city by Section Seven of an Act of the Legislature of the State of Washington entitled "An Act relating to the taxes and funds of Municipal Corporations

having less than twenty thousand inhabitants," approved March 16, 1897, amounted to a large sum; that about the years 1902 and 1904, such portions of said unpaid taxes as had not previously been collected or otherwise realized in money, became merged in the real estate upon which they were a charge, the title to which was acquired by the County of Jefferson, State of Washington, through the issue to said county of certificates of delinquency against said real estate and proceedings to foreclose the tax liens embraced in such certificates of delinquency and the purchase of such real estate under said foreclosure proceedings, pursuant to the statutes.

The plaintiff further shows that the assets of the indebtedness fund of said City of Port Townsend now consist of:

a. Money which has been paid over to the Treasurer of said city by the Treasurer of the said County of Jefferson, the [16] Collector of Taxes for said city, which he had collected from the taxes so as aforesaid levied by said city for the payment of indebtedness out of the indebtedness fund, and not yet applied to the payment of such indebtedness, and money apportioned to said city as its share of the money derived by the said county of Jefferson from the sale by said county of parcels of the real estate, title to which said County of Jefferson acquired in the manner above stated, and not yet applied to the payment of indebtedness which was or is entitled to be paid from said indebtedness fund, which said moneys remaining unapplied as aforesaid, amount altogether to about the sum of ten thousand dollars.

b. Uncollected taxes levied as aforesaid by said city for the payment of indebtedness from said indebtedness fund not exceeding in amount the sum of three hundred dollars, and the share which the said City of Port Townsend will be entitled to receive out of money which the said County of Jefferson may realize from the sale of the unsold parcels of real estate title to which said county acquired in the manner above described, the total cash value of which unsold real estate is not above the sum of ten thousand dollars and the share of the said City of Port Townsend of the price for which it may be sold by said county will not be greater than one-third thereof.

The plaintiff further shows that the aforementioned ten thousand dollars has accumulated in the hands of the City Treasurer of said city by receiving smaller sums from time to time; that on March 1, 1910, the said accumulation was more than sufficient to pay in full, including the interest, the said warrant numbered 2; nevertheless the said City Treasurer did not then, nor before, nor since, call in said warrant for payment, nor did he ever call in for payment any of the aforementioned warrants numbered 2 to 159, nor ever pay any thereof. [17]

Wherefore, the plaintiff demands judgment against the defendant for seven thousand eight hundred and eighty dollars, the aggregate amount of the warrants numbered 116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145, 146, issued to the Bank of British Columbia, with interest on said sum at the rate of six per cent per annum since

the 18th day of February, 1898. Also for six thousand seventy-two dollars and eighty cents, the aggregate amount of the warrants numbered 49, 60, 100, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, issued to the Manchester Savings Bank, with interest on said sum at the rate of six per cent per annum since the 18th day of February, 1898, besides the costs and disbursements of this action.

Dated June 12, 1911.

J. A. BENTLEY,
Attorney for Plaintiff. [18]

State of Washington,
County of King,—ss.

J. A. Bentley, first being duly sworn, deposes and says that he is the attorney for the plaintiff in the foregoing amended complaint described; that the plaintiff is a nonresident corporation and there is no officer of said corporation in the said County of King, nor in the State of Washington, and for that reason this affidavit of verification is made by deponent. This affiant has in his possession all of the warrants of the City of Port Townsend upon which this action is founded and has personally examined a great portion of the records which contain the data upon which the allegations are founded and says that he verily believes that each and every of the allegations of the complaint are true.

J. A. BENTLEY.

Subscribed and sworn to before the undersigned this 13th day of June, 1911.

SAM'L D. BRIDGES,
Clerk United States Court.
B. O. Wright,
Deputy.

[Indorsed]: Amended Complaint. Filed U. S. Circuit Court, Western District of Washington. June 13, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy. [19]

In the United States Circuit Court for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Demurrer.

Comes now the defendant herein and demurs to the Amended Complaint of plaintiff on the following grounds:

1. On the ground that the said complaint does not state facts sufficient to constitute a cause of action.

2. On the ground that the said action has not been commenced within the time required by law.

U. D. GNAGEY,
Attorney for Defendant.

[Indorsed]: Demurrer. Filed U. S. Circuit Court, Western District of Washington. July 10, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy. [20]

United States Circuit Court, Western District of Washington, Northern Division.

No. 1872.

FILED DEC. 1, 1911.

FIRST NATIONAL BANK OF CENTRAL CITY,
Plaintiff,

vs.

CITY OF PORT TOWNSEND,
Defendant.

Memorandum Decision on Demurrer to Amended Complaint.

The law of this case has been settled by the decision of the Circuit Court of Appeals, 184 Fed. Rep 574. By that decision the plaintiff is entitled to recover a money judgment in this court for an amount of indebtedness payable out of a designated fund which the City of Port Townsend is legally obligated to provide, such judgment to be the basis for proceedings to compel, by mandamus, the performance of the legal duty of the city to levy and collect taxes necessary to meet its obligations payable out of said special fund. The allegations of the amended complaint are sufficiently explicit to show that there is a large amount of indebtedness to be provided for; that the available funds added to taxes levied and

not collected, are inadequate and that the city has neglected to levy additional taxes and it is a legal conclusion therefrom that the city is derelict and subject to coercive process by a writ of mandamus.

The argument in support of the demurrer appears to be based upon the single proposition that the case is not ripe for a proceeding to obtain a writ of mandamus because the amended complaint fails to allege that the city has refused to make an additional levy of taxes after a demand. It is the opinion of the Court that this point is not well taken. It is true that [21] the case is not ripe for the issuance of a mandamus, but, in the legal order of procedure, the plaintiff should obtain a judgment, previous to making a demand, to be followed by an application for a mandamus.

The demurrer is overruled and the defendant's request for thirty days time within which to answer the complaint is granted.

C. H. HANFORD,
United States District Judge.

[Indorsed]: Memorandum Decision on Demurrer to Amended Complaint. Filed U. S. Circuit Court, Western District of Washington. Dec. 1, 1911. James C. Drake, Clerk. B. O. Wright, Deputy. [22]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF CENTRAL CITY,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Answer.

Comes now the above-named defendant, City of Port Townsend, and for answer to the amended complaint of plaintiff alleges as follows:

1. Defendant admits all the allegations of plaintiff's amended complaint contained in lines ten to twenty, inclusive, on page one thereof.

2. Defendant admits all the allegations contained in lines thirteen to twenty-one to and including the word, warrant, in said line twenty-two, on page three of said complaint; also all the allegations contained in lines four to twelve, inclusive, on page eleven of said complaint.

3. Defendant admits all the allegations contained in lines twenty-seven to thirty-two, inclusive, on page three; also all the allegations contained in lines eighteen to twenty-three, inclusive, on page eleven of said complaint.

4. Defendant admits all the allegations contained in said complaint beginning with line thirty-three on page three down to and including line fifteen on page six.

5. Defendant admits all the allegations contained in said complaint beginning with line seventeen on page six down to and including line twenty-one on page seven. [23]

6. Defendant denies each and every other allegation contained in the said complaint except as the same are hereinafter expressly admitted or specifically set forth.

As an affirmative defense to the said action the said defendant alleges as follows:

1. That the City of Port Townsend, Washington, was duly incorporated by the act of the legislative assembly of the Territory of Washington entitled "An Act to incorporate the City of Port Townsend" approved on the 28th day of November, 1881, and the act amendatory thereto entitled "An Act to Amend an Act to Incorporate the City of Port Townsend, Washington," approved November 28, 1883, and on August 16, 1896, the said city was duly reincorporated under the general laws of the State of Washington as a city of the third class and ever since said time has been and now is a city of the third class in said state.

2. That the warrants described in plaintiff's amended complaint as numbered, respectively, 116, 117, 118, 119*1*, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145, and 146, drawn on the Indebtedness Fund of said city, were ordered by the city council of said city on the 17th day of February, 1898, and were issued on February 18, 1898, in satisfaction of a judgment rendered against the City of Port Townsend on February 1, 1898, in cause No. 1258 of the

Superior Court of the State of Washington for Jefferson County, wherein The Bank of British Columbia was plaintiff and the City of Port Townsend was defendant; that the said judgment was so rendered against the said city upon the complaint in said action and upon findings of fact substantially following the said complaint, and a true and correct copy of the said complaint upon which the said judgment was so rendered is as follows: [24]

In the Superior Court of Jefferson County Washington.

BANK OF BRITISH COLUMBIA, OF VICTORIA, B. C.,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Second Amended Complaint.

To the Hon. R. A. BALLINGER, Judge of the Above-entitled Court:

Comes now the plaintiff and by leave of Court first obtained, files this its second amended complaint, and for a first cause of action against the said defendant, complains and alleges:

I.

That the plaintiff the Bank of British Columbia of Victoria, B. C. was at all the times hereinafter mentioned, and now is, a corporation duly incorporated and doing business under a Royal Charter from the United Kingdom of Great Britain, with

its place of business at Victoria, in the Province of British Columbia.

II.

That the City of Port Townsend is a municipal corporation, duly incorporated and created under the Act of the Legislature of the Territory of Washington, entitled, "An Act to incorporate the City of Port Townsend" approved November 28th, 1881, and the Act of the Legislaure of the Territory of Washington, entitled "An Act to amend an act entitled 'An Act to incorporate the City of Port Townsend,' approved November 28th, 1881," which said last act was approved November 28th, 1883.

III.

That on or about the 26th day of February, 1890, the said defendant, the City of Port Townsend duly made and entered into an agreement with one Charles O'Brien, for the grading and filling of Monroe Street, in said City of Port Townsend, and by which said agreement, the said defendant agreed to make and deliver to the said Charles [25] O'Brien, warrants upon the Treasurer of said city, payable to the order of said Charles O'Brien, for the amount due and payable to him, under and by virtue of said contract, said warrants to be drawn upon and to be paid out of the special fund to be known as the Monroe Street (Grade and Fill) Fund, which said fund the said City of Port Townsend agreed to provide and create according to law.

IV.

That the said Charles O'Brien duly performed each and all of the conditions and requirements of

said agreement, as was required of him and that on or about the 5th day of April, 1890, the said defendant duly made and delivered to the said Charles O'Brien, in part payment for the work and labor performed by him and materials furnished by him, under said contract, a warrant, which is substantially in the words and figures following, to wit:

"No. 81.

City of Port Townsend, April 5, A. D. 1890.

By Order of City Council of April 4, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to Charles O'Brien, or order, Four hundred ninety-one 64/100 Dollars, and charge the same to the account of Monroe Street (Grade and Fill) Fund being Mch. 90 estimate of street for 26,221 feet of cribbing. The City of Port Townsend guarantees the principal with interest at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$491.64.

[Endorsements]: Presented for Payment Apl. 5th, 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

Sept. 10/91 Received on principal....$245.82
" " " " Interest..... 35.15

FIRST NATIONAL BANK.
Per SLOCUM.

CHARLES O'BRIEN. [26]

Subscribed and sworn to before me this 17th day of April.

[Notarial Seal] DEL CARY SMITH,
Notary Public."

V.

That afterwards, to wit, on or about the 5th day of April, 1890, the said warrant was endorsed, for value received, to this plaintiff, and plaintiff is now the owner and holder thereof, and that on the 10th day of September, 1891, the said defendant paid the sum of $35.15 interest thereon to that date, and on said day paid the further sum of $245.82 on account of the principal thereof, and that there is now due and owing to the plaintiff thereon the sum of $245.82, with interest thereon at the rate of ten per cent per annum from the 10th day of September, 1891.

VI.

That the said defendant, the City of Port Townsend, by general ordinance, did prescribe the mode in which the charge on the respective owners of lots or land and on the lots and lands shall be assessed and determined for the purpose of the said improvement, which said ordinance is entitled as follows: "Ordinance No. 160. An Ordinance prescribing the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed, determined and collected for street improvements," which said ordinance passed the Council, March 4th, 1887, and was approved by D. W. Smith, Mayor on the 4th day of March, 1887, and the said defendant, the said City of Port Townsend, did duly make, create and levy a special tax and assessment for such

improvement on the lots and parcels of land fronting on such street, highway or alley aforesaid, sufficient to pay the expenses of such improvement; that the said City of Port Townsend has failed, neglected and refused to collect the said assessment and tax, and has failed, neglected and refused to create and provide the fund for the payment and redemption of said warrant, or any part thereof, except as hereinbefore alleged to have [27] been paid, and the said City of Port Townsend has failed, neglected and refused and still fails, neglects and refuses to collect the charge, and enforce the lien for such special tax and assessment as provided by law.

VII.

Plaintiff further alleges that the time allowed by law to collect the assessment and special tax aforesaid, and provide the fund for the redemption and payment of said warrant and collect the same from the property liable therefor, and to be assessed therefor, has long since elapsed, and that the said defendant, the City of Port Townsend is barred by the Statute of Limitations from enforcing and collecting the special tax and assessment against the property and on the lots and parcels of land fronting on the street, highway and alley along which said improvements were made, and from collecting the amounts of such assessment, personally, from the owner or owners of the lots and lands at the time of the making of said assessment, and this plaintiff has been, and therefore is, prevented from obtaining payment of the said warrant out of said fund by the

failure, neglect, fault, refusal and fraud of the defendant, without any failure, neglect, fault, refusal or fraud of this plaintiff or his assignors.

For a second cause of action against defendant, plaintiff alleges:

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action each and every allegation of the first and second and third paragraph of the first cause of action herein.

II.

That the said Charles O'Brien duly performed each and all of the conditions and provisions of said agreement, as was required of him, and that on or about the 5th day of April, 1890, the said defendant duly made and delivered to the said Charles O'Brien, in part payment for the work and labor performed by him, and materials furnished by [28] him, under said contract, a warrant, which is substantially in the words and figures following, to wit:

"No. 83.

City of Port Townsend, April 5th, A. D. 1890.

By Order of City Council of April 4, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to Charles O'Brien, or order, Four hundred and ninety-one and 65/100 Dollars, and charge the same to the account of Monroe Street (Fill and Grade) Fund, being March. 90 estimate for 26,221 feet of cribbing. The City of Port Townsend

guarantees the principal with interest at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$491.65.

[Endorsements]: Presented for payment April 5'', 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

Sept. 10/91. Received on principal...$245.83
" " Interest.... 35.16
FIRST NAT'L. BANK.
SLOCUM.

CHARLES O'BRIEN.

Subscribed and sworn to before me, this 17th day of April, 1890.

[Notarial Seal] DEL CARY SMITH,
Notary Public.''

III.

That afterwards, to wit, on or about the 5th day of April, A. D. 1890, the said warrant was, for value received, endorsed to this plaintiff, and plaintiff is now the owner and holder thereof, and that on the 10th day of September, 1891, the said defendant paid the sum of two hundred and forty-five dollars and 83/100, on account of the principal of said warrant, and on said day paid the further sum of $35.16, interest thereon to that date, and no further or other payments have ever been made, and there is now

due and owing this plaintiff thereon, the sum of $245.83, with interest thereon at the rate of ten per cent per annum from September 10th, 1891. [29]

IV.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation of the sixth and seventh paragraphs of the first cause of action herein.

For a third cause of action against defendant, plaintiff alleges:

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action each and every allegation of the first and second paragraphs of the first cause of action herein.

II.

That on or about the 26th day of February, 1890, the said defendant, the City of Port Townsend, duly made and entered into an agreement with one Charles O'Brien, for the filling and grading of Monroe Street, from Washington to Lawrence Street, in said City of Port Townsend, the said defendant agreeing to make and deliver to the said L. H. Cays warrants upon the Treasurer of said city, payable to the order of said Charles O'Brien, for the amount due and payable to him, for the work and labor done and materials supplied by him, under and by virtue of said contract, said warrants to be drawn upon, and to be paid out of the special fund, to be known as the Monroe Street (Fill and Grade) Fund, which said fund the said City of Port Townsend agreed to provide and create according to law.

III.

That the said Charles O'Brien duly performed each and all of the conditions and provisions of said agreement, as was required of him, and that on or about the 5th day of April, 1890, the said defendant duly made and delivered to the said Charles O'Brien, in part payment for the work and labor performed by him, and materials furnished by him under said contract, a warrant, which is substantially in the words and figures following, to wit:

"No. 34.

City of Port Townsend, April 5, A. D. 1890. [30]

By Order of City Council of April 4, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to Charles O'Brien, or order, Fifteen Hundred Dollars, and charge the same to the account of Monroe Street (Fill and Grade) Fund, Washington to Lawrence Street, being Mch 90 estimate to be deducted from final estimate. The City of Port Townsend guarantees the principal with interest at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$1,500.00.

[Endorsements]: Presented for payment April 5", 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

Sept. 10/91. Received on principal.....750.00
" " Interest....107.29

FIRST NATIONAL BANK,
SLOCUM.

CHARLES O'BRIEN, D. C. S.

Subscribed and sworn to before me this 17th day of April, 1890.

[Notarial Seal] DEL CARY SMITH,
Notary Public."

IV.

That afterwards, to wit, on or about the 5th day of April, 1890, the said warrant was, for value received, endorsed to this plaintiff, and plaintiff is now the owner and holder thereof. That on the 10th day of September, 1891, the said defendant paid the sum of seven hundred and fifty dollars on account of the principal of said warrant, and on said day paid the further sum of one hundred and seven and 29/100 dollars, interest thereon to that date, and no other or further payments have ever been made thereon, although often demanded, and there is now due and owing to plaintiff the sum of $750.00 with interest thereon at the rate of ten per cent per annum, from the 10th day of September, 1891. [31]

V.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation of paragraphs six and seven, of the first cause of action herein.

For a fourth cause of action against defendant, plaintiff alleges:

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation of paragraphs one and two of its first cause of action herein.

II.

That on or about August 30th, 1889, the said defendant duly made and entered into an agreement with Fred M. Terry and John McDougall, for the improving of Adams Street, in said City of Port Townsend, and by which said agreement the said defendant agreed to make and deliver to the said Fred M. Terry and John McDougall warrants upon the Treasurer of said city, payable to the order of said Fred M. Terry and John McDougall for the amount due and payable to them for the work and labor performed *done* and materials furnished by him under and by virtue of said contract, said warrants to be drawn upon, and to be paid out of the special fund, to be known as the Adams Street Improvement Fund, which said fund the said City of Port Townsend agreed to provide and create according to law.

III.

That the said Fred M. Terry and John McDougall duly performed each and all of the conditions and provisions of said agreement, as was required of them, and that on or about the 5th day of April, A. D. 1890, the said defendant duly made and delivered to the said John McDougall, one of said contractors, Fred M. Terry and John McDougall, in part payment for the work and labor performed by

him, and materials furnished by him under said contract, a warrant which is substantially in the words and figures following, to wit: [32]

"No. 85.

City of Port Townsend, April 5, A. D. 1890.

By Order of the City Council of April 4, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to John McDougall, or order, Twenty Hundred and Sixty and 85/100 Dollars and charge the same to the account of Adams Street Imp.: Cribbing estimate of Apr. for Mch. work—for 24,980, for said street. The city guarantees the principal and interest on the same at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DL CARY SMITH,
City Clerk.

$2,060.85.

[Endorsements:] Presented for payment April 8," 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.
JOHN McDOUGALL.

Identified W. J. McKEON.

I hereby certify that the above is the true signature of Walter Bowen, City Treasurer of Port Townsend.

April 8/90. W. F. FENIMORE,
Clerk of the Superior Court of Jefferson County."

IV.

That afterwards, to wit, on or about the 8th day of April, 1890, the said warrant was, for value received, endorsed to this plaintiff, and this plaintiff is now the owner and holder thereof, and that there is now due and owing to this plaintiff thereon the sum of $2,060.85, with interest thereon at the rate of ten per cent per annum from April 8th, 1890.

V.

Plaintiff here repeats, reiterates, adopts and makes part of this cause of action each and every allegation of the sixth and seventh paragraphs of its first cause of action herein.

For a fifth cause of action against defendant, plaintiff alleges: [33]

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation contained in paragraphs one and two of the first cause of action herein.

II.

That on or about the 28th day of December, 1889, the said defendant, the City of Port Townsend, duly made and entered into an agreement with one W. C. Williams, for the grading of Jefferson Street, from Jackson to Walker Streets, in said City of Port Townsend, and by which said agreement the defendant agreed to make and deliver to the said W. C. Williams, warrants upon the Treasurer of said city, payable to the order of said W. C. Williams, for the amount due and payable to him, for the work and labor done and materials supplied by him under and

by virtue of said contract, said warrants to be drawn upon and to be paid out of the special fund, to be known as the Jefferson Street Grade Fund, which said fund the said City of Port Townsend agreed to provide and create according to law.

III.

That the said W. C. Williams duly performed each and all of the conditions and provisions of said agreement, and that on or about the 10th day of May, 1890, the said defendant duly made and delivered to the said W. C. Williams, in part payment for the work and labor performed by him, and the materials furnished by him under said contract, a warrant which is substantially in the words and figures following, to wit:

"No. 97.

City of Port Townsend, May 10, A. D. 1890.

By Order of City Council of May 9, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to W. C. Williams, or order, Two Thousand Eight Hundred and Twelve and 50/100 Dollars and charge the same to the account of Jefferson Street Grade Fund—From Jackson to Walker Street—75% of [34] 30,000 yrds. fill. The City of Port-Townsend guarantees the interest on this warrant at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$2,812.50.

[Endorsements]: Presented for payment May 10," 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

Recd, Port Townsend, Wash., Apl. 15," 1891.—Two hundred and forty-five Dolls, ($245.00) on the within.

D. M. SLOCUM,
Asst. Cashier First N. Bank.

W. C. WILLIAMS."

IV.

That afterwards, to wit, on or about the 10th day of May, 1890, the said warrant was, for value received, endorsed to this plaintiff and plaintiff is now the owner and holder thereof, and that on the 15th day of April, 1891, the said defendant paid on said warrant the sum of $245.00, and there is now due and owing this plaintiff the sum of $2829.16 with interest thereon at the rate of ten per cent per annum from the 15th day of April, 1891.

V.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action each and every allegation of the sixth and seventh paragraphs of its first cause of action herein.

For a sixth cause of action herein against defendant, plaintiff alleges:

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation contained in the first and second paragraphs of its first cause of action herein.

II.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action, each and every allegation contained in paragraph II of its fifth cause of action herein. [35]

III.

That the said W. C. Williams duly performed each and all of the conditions and provisions of the said agreement, as was required of him, and that on or about the 10th day of February, May, 1890, the said defendant duly made and delivered to the said W. C. Williams, in part payment for the work and labor performed by him, and materials furnished by him under said contract, a warrant, which is substantially in the words and figures following, to wit:

"No. 98.

City of Port Townsend, May 10, A. D. 1890.

By Order of City Council of May 9, A. D. 1890.

The Treasurer of the City of Port Townsend, Washington Territory:

Pay to W. C. Williams, or order, Two thousand Dollars and charge the same to the account of Jefferson Street Grade Fund, Jackson to Walker, being estimate of May 9–90. The City of Port Townsend guarantees the interest on *the* this warrant at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$2000.00.

[Endorsements]: Presented for payment May 10," 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

W. C. WILLIAMS."

IV.

That afterwards, to wit, on or about the 10th day of May, 1890, the said warrant was, for value received, endorsed to this plaintiff, and plaintiff is now the owner and holder thereof, and there is now due and owing the plaintiff thereon the sum of $2000.00 with interest thereon at the rate of ten per cent from the 10th day of May, 1890.

V.

Plaintiff here repeats, reiterates, adopts and makes part of this cause of action each and every allegation contained in the sixth and seventh paragraphs of the first cause of action herein.

For a seventh cause of action against defendant plaintiff alleges: [36]

I.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action each and every allegation contained in the first and second paragraphs of the first cause of action herein.

II.

That on or about the 28th day of December, 1890, the said defendant, the City of Port Townsend, duly made and entered into an agreement with one W. C. Williams for the grading and filling of Jefferson Street in said City of Port Townsend, and by which said agreement the defendant agreed to make and

deliver to said W. C. Williams, warrants upon the Treasurer of said city, payable to the order of said W. C. Williams, for the amount due and payable to the said W. C. Williams, for the work and labor done and materials furnished by him under said contract, said warrants to be drawn upon and to be paid out of the special Fund to be known as the Jefferson Street Grade Fund, which said fund, the said City of Port Townsend agreed to provide and create according to law.

III.

That the said W. C. Williams duly performed each and all of the conditions and provisions of said agreement, as was required of him, and that on or about the 10th day of May, 1890, the said defendant duly made and delivered to the said W. C. Williams, in part payment for the work and labor performed by him and materials furnished by him under said contract, a warrant, which is substantially in the words and figures following, to wit:

"No. 99.

City of Port Townsend, May 10, 1890.

By Order of City Council of May 9, A. D. 1890.

To the Treasurer of the City of Port Townsend, Washington Territory:

Pay to W. C. Williams, or order, Two thousand six hundred and twenty-seven and 00/100 Dollars, and charge the same to the account of Jefferson Street Grade Fund, being 30,847 yds. fill on said street ¾ of [37] same for May 9–90. The City of Port Townsend guarantees the interest on this war-

rant at ten per cent per annum.

J. A. KUHN,
Mayor of the City of Port Townsend.
Attest: DEL CARY SMITH,
City Clerk.

$2627.00.

[Endorsements]: Presented for payment May 10," 1890, and not paid for want of funds.

WALTER BOWEN,
City Treas.

W. C. WILLIAMS."

IV.

That afterwards, to wit, on or about the 10th day of May, 1890, the said warrant was, for value received, endorsed to this plaintiff, and plaintiff is now the owner and holder thereof, and that there is now due and owing the plaintiff thereon the sum of two thousand six hundred and twenty-seven ($2627.00) dollars with interest thereon at the rate of ten per cent per annum from the 10th day of May, A. D. 1890.

V.

Plaintiff hereby repeats, reiterates, adopts and makes part of this cause of action each and every allegation of the sixth and seventh paragraphs of the first cause of action herein.

WHEREFORE Plaintiff prays judgment against the said defendant as follows:

On the first cause of action herein in the sum of $245.82, with interest thereon at ten per cent per annum from September 10, 1891.

On the second cause of action herein, in the sum of $245.82, with interest at ten per cent per annum from September 10th, 1891.

On the third cause of action herein, in the sum of $750.00 with interest at the rate of ten per cent per annum from September 10th, 1891.

On the fourth cause of action herein, in the sum of $2,060.85 with interest at ten per cent per annum from April 8th, 1890. [38]

On the fifth cause of action herein, in the sum of $2829.16, with interest at the rate of ten per cent per annum from April 15, 1891.

On the sixth cause of action herein, in the sum of $2,000.00 with interest at ten per cent per annum from May 10th, 1890.

On the seventh cause of action herein in the sum of $2627.00, with interest at ten per cent per annum from May 10th, 1890.

Altogether in the sum of $10,758.65, with interest as aforesaid, and for its costs and disbursements herein, and for such other and further relief as may be just and equitable.

MORRIS B. SACHS,
Plaintiff's Attorney. [39]

3. That the warrants described in plaintiff's complaint as numbered, respectively, 49, 60, 100, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159, drawn on the Indebtedness Fund of said city were ordered by the City Council of said city on the 17th day of February, 1898, and were issued on February 18, 1898, in satisfaction of a judgment rendered against the City of Port Townsend on February 5,

1898, in cause No. 1538 of the Superior Court of the State of Washington for the County of Jefferson, wherein The Manchester Savings Bank was plaintiff and the City of Port Townsend was defendant; that the said judgment was so rendered against the said city upon the complaint in said action and upon the findings of fact substantially following the said complaint, except as hereinafter stated, and a true and correct copy of the said complaint upon which said judgment was so rendered is as follows: [40]

In the Superior Court of the State of Washington, for the County of Jefferson.

THE MANCHESTER SAVINGS BANK, a Corporation,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a Municipal Corporation,

Defendant.

COMPLAINT.

To the Hon. R. A. BALLINGER, Judge of the Above-entitled Court:

Comes now the above-named plaintiff, and complaining of the defendant, for a first cause of action against said defendant alleges:

I.

That plaintiff, the Manchester Savings Bank, is and at the several times hereinafter mentioned was a banking corporation organized and existing under the laws of the State of New Hampshire.

2.

That the City of Port Townsend is a municipal corporation duly incorporated and created under an act of the Legislative Assembly of the Territory of Washington, entitled "An act to incorporate the City of Port Townsend," approved Nov. 28, 1881, and the act of the Legislative Assembly of the Territory of Washington entitled "An Act to amend an act entitled 'An Act to incorporate the City of Port Townsend'" approved November 28, 1881, which said last act was approved November 28, 1883.

3.

That in and by section 2 of this act of incorporation, it was and is provided that the said defendant may sue and be sued and may contract and be contracted with, and in and by section 7 of said act of incorporation the said defendant was and is among other things endowed with and given power to provide for the clearing, opening, gravelling, improving and repairing of streets, highways and alleys and for the prevention and removal of all obstructions therefrom, or [41] form any cross or sidewalk and for such purposes was and is given power to assess, levy and collect each year, a road poll tax of not less than four dollars, nor more than six dollars, of every male inhabitant of said city between the ages of twenty-one and fifty years, except persons that are a public charge and also a special tax on property that is within said City of Port Townsend of not less than two or more than four mills of every dollar's worth of said property, which said tax should be expended

for the purposes specified in said section; and in addition thereto in constructing and repairing sidewalks, and in curbing, paving, grading, macadamizing and guttering any street, highway or alley therein, by section 8 of said act power is given to said defendant to levy and collect a special tax or assessment on the lots or parcels of land fronting on said highway or lots, sufficient to pay the expense of such improvement, provided that unless the owners of more than one-half the property subject to assessment for such improvement petition the Common Council of said defendant to make the same, such improvement shall not be made until at least five members of the Common Council by vote assent to the making of the same.

4.

That on the 31st day of April, 1885, said Common Council of said defendant, City of Port Townsend, duly ordained and passed the following ordinance, entitled "An Ordinance to provide for contracts for street improvements," being ordinance No. 117, which ordinance was on the fourth day of April, 1885, duly approved by the Mayor of said city and is still in force; which said ordinance is as follows, to wit:

Ordinance No. 117.

To provide for contracts for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That within twenty days after the passage of any ordinance for curbing, paving, grading, filling, macadamizing or guttering [42] any street, highway or alley in the City of Port Town-

send, or for the construction or repair of any sidewalk in any such street, highway or alley, the City Surveyor shall prepare and submit to the Common Council, all necessary plans, specifications and estimates for such improvements, and such plans, specifications and estimates, when approved by said Council shall be filed with the City Clerk.

Sec. 2. That within three days after the filing of such plans, specifications and estimates, the clerk shall advertise a notice calling for sealed bids for such improvements to be made according to such plans, specifications and estimates. Such notice shall be published for five days, successively, in any newspaper published in the city. All bids must be filed in the office of the Clerk on or prior to a day to be specified in such notice, and the Clerk shall endorse on the envelope or cover of each bid the date of filing the same; and he shall receive no bid after the day specified in such notice for receiving the same. Provided, that if no bid shall be received and accepted by the Council in response to such notice, the Clerk shall immediately readvertise a similar notice, and he shall so advertise as many times as may be necessary, or until a contract shall be awarded for such improvement, unless otherwise ordered by the Council, and shall receive bids in the same manner and subject to all the provisions of this ordinance, as in the case of the original call for bids.

Sec. 3. That at the first meeting of the Council after the time specified in any notice for bids, the Council shall open and consider all bids received,

and may reject any and all, or may accept that of the lowest responsible bidder or bidders, and award a contract thereon. And the Council may, if deemed advisable, at the times of awarding any contract under the provisions of this ordinance, require the contractor or contractors to give a bond to the City of Port Townsend in any sum to be specified, with sufficient sureties, to be approved **[43]** by the Mayor, conditioned for the faithful execution of the terms of the contract.

Sec. 4. That when any bid shall have been accepted by the Council, and a contract awarded thereon, such contract shall be reduced to writing and signed by the contractor or contractors, and by the Mayor and Clerk in behalf of the City, and sealed with the corporate seal of the City in duplicate, and one of the originals of such contract shall be filed with the Clerk, and authority to sign such contract on behalf of the City is hereby conferred upon the Mayor and Clerk.

Sec. 5. That this ordinance shall take effect and be in force at and after 5 days after the same shall have been published.

Passed the Council April 3, 1885.

Approved April 4, 1885.

C. M. BRADSHAW,
Mayor.

J. J. CALHOUN,
City Clerk.

5.

That on the 4th day of March, 1887, the Common Council of said defendant, City of Port Townsend,

duly ordained and passed the following ordinance, entitled "An ordinance prescribing the mode in which the charge on the respective owners of lots and lands shall be assessed and collected, determined for street improvements," the same being ordinance No. 160; which said ordinance reads as follows:

Ordinance No. 160.

An ordinance prescribing the mode in which the charge of the respective owners of lots or lands, or on the lots or lands shall be assessed, determined and collected for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That whenever the Common Council of the City of Port Townsend shall cause any part of any street, highway or alley therein to be curbed, paved, graded, macadamized or guttered, or cause any [44] sidewalks to be constructed or repaired in any street, highway or alley in said City, the whole cost of such improvement shall be levied and become a lien upon the taxable real estate fronting on such street or alley as may be improved, and as may be without any assessment district, established as hereinafter provided; provided, that if the City Council, at any one time, cause two or more intersecting streets to be so improved, the cost of so improving the area of the intersections shall be equally divided between the property fronting on each of said intersecting streets.

Sec. 2. That all assessments for such improvements shall be according to value, so that each lot or other smallest subdivision of real estate sub-

ject to assessment, shall be held for such portion of the whole cost of the improvement within any assessment district, as the value of such lot or smallest subdivision of real estate bears to the aggregate value of the assessable property within said assessment district. And as fixing values, all improvements upon real estate shall be excluded, and the lands only shall be assessed; and the costs of any such improvement shall include all lawful charges and expenses incident to such improvement, and making and collecting the assessment therefor.

Sec. 3. That the property fronting on any such improvement and subject to assessment therefor, shall constitute a special assessment district, and the boundaries of such assessment district shall be lines running parallel with the street to be improved through the middle of the tier of blocks fronting on such street, each side of the same; and in case the land so fronting is not parallel into blocks, then such line shall run parallel with the street so improved at a distance of 110 feet from the boundary line between such street and the property abutting them, and such lines shall close with lines at right angles with such street across each terminus of the improvement. Provided, if the Council shall, at any one time, cause two or [45] more streets to be improved, districts shall nevertheless be formed with boundaries as herein provided, so that a separate district shall be formed for such street so improved. Provided, further, that when any street or any part thereof, shall be

ordered improved, and such improvement is not to be of uniform character along the whole line of such improvement, then such improvement shall be divided into separate assessment districts, so that each assessment district shall include only improvements of uniform character as near as may be.

This provision shall apply to the grading or other improvement of the roadbed of the street, and sidewalks, or to both, as the case may be, as that separate distance may be found for each kind of improvement, if deemed advisable by the Council. In case more than one assessment district shall be required as above provided, or in any case, the Council shall deem it advisable to make separate districts for the different kinds of improvements, the length and nature of each assessment district shall be fixed by an order of the Council at the time of equalizing the assessment, as provided by section 6 of this ordinance.

Sec. 4. That within twenty days after the council shall have passed an ordinance for such improvement of any street, highway or alley, the City Surveyor shall prepare and file with the Clerk a plat of the street or streets so to be improved, and of the real estate subject to assessment therefor, showing the lines of each lot or other smallest subdivision thereof; and within ten days thereafter, the City Assessor shall prepare and file with the Clerk an assessment-roll for the district, or an assessment-roll for each of said assessment districts, if several streets are to be improved at the same time, upon which assessment-roll each lot or other smallest

subdivision of real estate in such district shall be listed in the name of the owner thereof, if known, or as "unknown" and assessed at the actual cash value thereof and such assessment-roll shall be open for public inspection [46] at the Clerk's office, from the filing thereof until the day of meeting of Council or equalization thereof, as herein provided.

Sec. 5. That within three days of the filing of such assessment-roll, the Clerk shall advertise a notice in some newspaper published in the city, to the effect that such assessment-roll (describing it) has been filed in his office, and that the same is open to public inspection and that any person feeling himself aggrieved by such assessment may apply to the Common Council to have the same corrected at a meeting of the Council to be designated in such notice, which meeting shall be the first regular meeting after the last publication of such notice, and such notice shall be published for ten days in successive issues of said newspaper.

Sec. 6. That at the first regular meeting of the Common Council after the last publication of such notice, the common Council shall equalize such assessment and shall hear all complaints concerning such assessment-roll and determine the same, and may raise or lower the valuation of any lot or parcel of real estate listed on such assessment-roll, so as to make the assessment equal and uniform, as near as may be, upon all property in the district, and shall, if any lot or parcel of real estate in such district be found to have been omitted from such

assessment-roll list the same and place a just valuation thereon. Provided, that valuation of any lot or parcel of real estate shall not be raised by the Council without the owner's consent, until at least twenty-four hours after a written notice of such proposed change shall have been served upon the owner or his agent, if such owner or agent can be found within the city, if not so found, then a notice of such proposed change in the assessment-roll must be published for at least three days in some newspaper published in the city, and the Council may adjourn from time to time if necessary, until the regulation of such assessment-roll is completed. [47]

Sec. 7. That as soon as practicable after such assessment shall be equalized, and the nature and extent of assessment districts shall have been fixed, and the cost of the improvement shall have been ascertained, the Council shall by an order, fix the rate of assessment for such district, or for each of such districts, as the case may be, so as to raise the necessary amount to pay for such improvement, in accordance with the provisions of this ordinance.

Sec. 8. That within ten days after the Council shall have so fixed the rate of assessment for any district, the clerk shall extend upon the assessment-roll for the same amount of the assessment upon each lot or parcel of real estate listed thereon, and prepare a duplicate of such assessment-roll and deliver the same to the City Treasurer, who shall, within three days thereafter, publish a notice in some newspaper published in the city, to the effect

that all assessments upon such roll must be paid to him within thirty days after the first publication of such notice, or the same will become delinquent. Such notice shall be published for three days.

Sec. 9. That all assessments shall be collected by the Treasurer, and if not collected within the time prescribed in the preceding section, the same shall then become delinquent, and the same, with interest, penalty and costs, shall be collected by suit in foreclosure of the lien for the same in accordance with the provisions of the charter of the city.

Sec. 10. That this ordinance shall take effect and be in force at and after five days after the same shall have been published.

Passed the Council March 4, 1887.

Approved March 4, 1887.

D. W. SMITH,
Mayor.

6.

That on or about the 31st day of August, 1888, the Common Council of said defendant, by a vote of five members of said council voting [48] in the affirmative, duly determined to make improvement of that part of Washington Street, between Taylor and Harrison Streets, and for that purpose duly ordained and passed the following ordinances number 212 which said ordinance was duly passed on the 31st day of August, 1888, on which passage five members of said Common Council voted in the affirmative therefor; that said ordinance was duly approved by the Mayor of said city and is still in force; said ordinance is entitled "An ordinance for grad-

ing portions of Washington street" and is as follows:

Ordinance No. 212.

The City of Port Townsend.

The City of Port Townsend does ordain as follows:

Section 1. That Washington Street from the easterly side of Taylor Street to the easterly side of Harrison Street be graded to the grade of said Washington Street as established by ordinance No. 201.

Sec. 2. That all lots and parcels of land fronting on said Washington Street as herein ordained, viz.: from the easterly side of Taylor Street to the easterly side of Harrison Street be, and the same is hereby declared to be, an assessment district for the purpose of this ordinance.

Sec. 3. This ordinance to take effect and be in force from and after five days from its publication.

Passed the Council Aug. 31, 1888.

Approved Aug. 31, 1888.

W. H. H. LEARNED,
Mayor.

Attest: JAMES SEAVY,
City Clerk.

7.

That pursuant to said ordinance No. 117 heretofore pleaded, the City Surveyor of said defendant duly prepared and submitted to the Common Council all necessary plans and specifications and estimates [49] for said improvement, and the same were duly approved by said Common Council

and filed with the City Clerk of said defendant.

8.

That immediately after the filing of such plans, specifications and estimates, pursuant to the provisions of said ordinance No. 117, the Clerk of said defendant duly advertised, calling for sealed bids for the making of such improvements according to such plans, specifications and estimates, and caused said notice to be duly published for the time and in the manner in said ordinance No. 117 provided.

9.

That within the time in said notice provided, one W. C. Williams, agreeably to the provisions of said ordinance No. 117, did submit in writing his bid for the making of said improvement and afterwards the Common Council of said defendant accepted the bid of said W. C. Williams as the lowest responsible bidder and awarded him the contract thereon; and thereafter and in pursuance of said acceptance, the said W. C. Williams duly entered into a contract in writing, signed by the said W. C. Williams and by the Mayor and Clerk of said City of Port Townsend in behalf of said city, under the corporate seal of said city, in duplicate, which contract is as follows:

This agreement made and entered into this 15th day of October, 1888, by and between the municipal corporation, the City of Port Townsend, the party of the first part and W. C. Williams of Seattle, W. T'y, the party of the second part,

Witnesseth that whereas the said party of the first part, by order and resolution duly passed by

its Common Council at a regular session thereof held on the 21st day of September, 1888, did invite and call for bids and proposals to do certain work on Washington Street in said city, which is more fully described hereinafter, and whereas the said city by its Common Council did, on the 1st day of [50] October, 1888, at a regular session of said Council, accept the bid for said work duly and regularly offered and filed by said party of the second part, he being the lowest responsible bidder for said work and

Whereas the said City, through its said Council, thereupon and thereafter duly authorized a contract to be entered into between said city and said second party for the doing of said work and instructed the Mayor and Clerk to sign and execute said contract on the part of said city.

Now, therefore, it is hereby agreed by and between the said parties hereto, that said party of the second part, for the consideration hereinafter named, agrees that he will do the work of grading Washington Street in said city from the easterly side of Taylor to east side of Harrison streets in said city according to the plans and specifications made by the City Surveyor and accepted by the party of the first part and now on file with the clerk of said first party.

It being expressly agreed, understood and covenanted, that the bulk heading set forth in said plans and specifications is considered as, treated as, and is a part of the grading of said street and that said bulkheading is to be as in said plans and

specifications set forth, and it is hereby agreed that the specifications and plans hereinbefore referred to are made part of and are a part and parcel of this agreement.

And it is hereby agreed by said second party to do said work of grading, including bulkheading, in a good workmanlike manner and according to plans and specifications aforesaid and to the satisfaction of said party of the first part, its Common Council and the committee on streets of said first party. And the said work of grading, including bulkheading, to be fully done and completed within seventy (70) days from the date of the execution of this contract. And the said party of the first part agrees to pay to the said second party, and the said party of the second part agrees to accept as compensation **[51]** therefor, at the rate of forty-nine (49) cents per cubic yard of earth in all excavations completing said grade from east side of Taylor to the east side of Harrison Street and for cribbing and bulkheading, seventeen and seventy-five one-hundredths dollars (17.75) per thousand feet for all lumber used in bulkheading or cribbing. Warrants or orders of said city, drawn upon the Washington Street improvement Fund as follows: At the first regular meeting of the Common Council in the month of December, A. D. 1888, seventy-five (75) per cent of the contract price for such portion of the work as the city surveyor and committee on streets shall certify to have been completed up to December 1st, 1888, and for the balance of said contract price at the first

regular meeting of the Council after the completion of said improvement and approved by said surveyor and said Council.

In witness whereof said party of the first part has caused these presents to be signed by its Mayor and Clerk and sealed with its seal this —— day of October, A. D. 1888.

W. H. H. LEARNED, (Seal)
Mayor.
JAMES SEAVEY, (Seal)
Clerk.
W. C. WILLIAMS. (Seal)

Signed, sealed in presence of:

[Corporate Seal] W. F. LEARNED.
GEO. H. JONES,
H. H. AMES,
CHAS. K. JENNER,
As to W. C. Williams.

And the said W. C. Williams fully complied with the requirements of said ordinance No. 117 in regard to such contracts; and did, in pursuance of the requirements of said Common Council duly execute and deliver his bond to said defendant, City of Port Townsend, in the sum of $——, conditioned for the faithful execution of the terms of said contract, which said bond was duly approved by the mayor of said defendant, City of Port Townsend. [52]

10.

That in pursuance of said contract, the said W. C. Williams at once entered upon the execution thereof, and completed said improvement and fully complied with all the terms and conditions of said contract

under the supervision of the Street Committee and City Surveyor of said defendant; and that afterwards the said defendant and the said W. C. Williams met together and had a settlement for and concerning the work done under the said contract, and said defendant by its proper officers and agents duly accepted said work, and said defendant according to the terms of said contract, issued among others the following warrants, drawn on the Washington Street Improvement Fund, to wit:

Warrant No. 15, for the sum of...$1000.00.
Warrant No. 16, for the sum of...$1000.00.
Warrant No. 17, for the sum of...$1000.00.
Warrant No. 18, for the sum of...$1000.00.
Warrant No. 21, for the sum of...$1034.48.

All of said warrants being dated February 11th, 1889, payable to W. C. Williams, or order, and signed by W. H. H. Learned, Mayor, and attested by James Seavey, Clerk of said defendant City, for and in behalf of said city; that all of said warrants were, on said 11th day of February, 1889, presented to the Treasurer of said defendant, City of Port Townsend, and payment thereof demanded, and such payment was refused for want of funds to make payment of the same, and said Treasurer endorsed on said warrants at such presentation "Presented this 11th day of February, A. D. 1889, and not paid for want of funds, C. M. Bradshaw, City Treasurer."

11.

That no part of said warrants has been paid except the interest up to the 11th day of August, 1892. [53]

13.

That the said contract above set forth, in so far as represented by the above-described warrants, and in the proportion that the above-described warrants bear to the whole amount issued on said Washington Street Improvement Fund, as well as each and all of said warrants above set forth and claims thereunder, was duly assigned for value to this plaintiff and that said plaintiff is now the owner and holder thereof.

13.

That at diverse and sundry times since the said warrants were first presented for payment, and payment thereof refused by the said defendant, the said defendant has been requested by plaintiff and its said assignor to provide a fund for the payment of said warrant, which it has at all times neglected and refused to do.

14.

That under and by virtue of ordinances No. 160 and 212, heretofore set forth, said defendant constituted a special assessment district, consisting of the property fronting on said improvement and established boundaries of such district embracing the property abutting on said improvement portion of said Washington Street, and pretended to file a plat of said street so to be improved and the real estate subject to assessment therefor, and in part complied with the provisions of said ordinance for assessing the costs of said improvement upon the property embraced within said improvement district; but though often requested by the plaintiff so to do, the

said defendant, has at all times, failed, neglected and refused and still does wholly fail, neglect and refuse to comply with the provisions of said ordinance No. 160 to assess the amount of said improvement, or cause the same to be extended upon the assessment-roll, deliver the same to the Treasurer of said city, or take any steps whatever for the due and legal assessment of said property, or the collection of the amount [54] of said improvement as by said ordinance provided; that plaintiff has repeatedly applied to said defendant and to its Mayor and Common Council, to make assessment and collection of the amount of said indebtedness, but that said defendant, its Mayor and Common Council, have, at all times, wholly neglected and refused to take any steps or to make any provision for the payment of said indebtedness or for the collection of the same from the owners of the property fronting on said improvement, and said defendant refuses to take any steps toward the collection of said money or the payment of said warrant, or any part thereof, and there is no money whatever in said fund for the payment of said warrant or any part thereof, and said defendant has wholly failed, neglected and refused to comply with any of the provisions, terms and agreements of the said contract or said ordinance.

15.

That since the date of entering into said contract, and the making of said improvement by said W. C. Williams, the property adjoining on said street fronting said improvement has greatly lessened in value, and has in many instances, become subject to

liens for delinquent taxes and has been sold and encumbered by the different owners thereof; and that by reason of said defendant failing to comply with the provisions of said ordinance No. 160, in making due assessment of the cost of said improvement upon the property fronting upon the same, and by reason of its neglect and failure to properly make assessment of the amount of said improvement and to collect the same, the means of the payment of the cost of said improvement under and by virtue of section 8 of the charter of said defendant, heretofore pleaded, and of said ordinance No. 160 enacted in pursuance thereof, have been wholly lost to plaintiff and its assignor, and said plaintiff and its assignor have at all times used due diligence in demanding the collection of said assessment of defendant, and are without fault in the premises. [55]

16.

That for the purpose of inducing the said W. C. Williams and his assignees to rely upon its good faith in the said premises, and upon its purpose to make payment for said improvement, and to induce the said W. C. Williams to enter into said contract, and as an assurance that said assessment would be by defendant levied promptly and duly collected and paid, defendant, at the time of making said contract, offered to guarantee the payment of said warrants with interest thereon at the rate of ten per cent per annum, and did in pursuance of such representation so indicate and promise in said warrants; relying upon said representations and conduct on the part of the defendant, plaintiff and its assignor were led to

believe and did believe that defendant would cause such assessment to be duly and legally made, levied and collected and expended by defendant in payment of said warrants and the indebtedness evidenced thereby.

17.

That at no time prior to nor at the time of incurring the said indebtedness for said improvement, including the same, was the indebtedness of said defendant as large as and equal to one and one-half per cent of the value of the taxable property in said City of Port Townsend.

18.

That by reason of the negligence on the part of the said defendant for failure to make said assessment and the collection of the same from the property abutting upon the street so improved, and by reason of the failure of said defendant to carry out the provisions of said contract and providing a fund for the payment of said warrants and by reason of the facts heretofore set forth herein, the said plaintiff has been and is damaged in the amount represented by said warrants as being due thereon as follows, to wit:

[56]

The sum of $5,034.48 with interest thereon at the rate of ten per cent per annum from the 11th day of August, 1892.

19.

That at all the times since the completion of said improvement on said street, said defendant has constantly used the said street and received full benefit of said improvement.

20.

That on the 26th day of March, 1895, the said plaintiff duly presented its claim to the Mayor and Common Council, in regular session, for allowance and payment, and that the said defendant and its Mayor and Common Council have wholly refused to allow or pay the said claim or any part thereof, and the whole of said claim as above set forth is now due and owing to this plaintiff from said defendant.

Wherefore plaintiff demands judgment against said defendant for damages for the sum of Five Thousand Thirty-four and 48/100 Dollars with interest thereon at the rate of ten per cent per annum from the 11th day of August, 1892, and for plaintiff's costs and disbursements herein.

W. W. FELGER,
DEL CARY SMITH, and
STRUVE, ALLEN, HUGHES & McMICKEN,
Attys. for Plff.

State of Washington,
County of Jefferson,—ss.

W. W. Felger, being first duly sworn, on oath deposes and says, that he is one of the attorneys for the plaintiff in the above-entitled action, that he makes this affidavit for and in behalf of said plaintiff as such attorney for the reason *the* that said plaintiff has no agent or officer in said county and state, that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

W. W. FELGER. [57]

Subscribed and sworn to before me this 25th day of June, 1895.

U. D. GNAGEY,
Notary Public. [58]

4. That while the complaint in said cause No. 1538 alleges, in paragraph fourteen thereof, that the city failed to make any assessment whatever, the amended answer of the defendant in said cause alleges that the assessment was duly made according to law and ordinances in force, that the same was duly equalized, extended upon the assessment-rolls, duplicate assessment-rolls, prepared and placed in the hands of the proper officer for collection, and the reply admitted such allegations, and the Court made the following among other findings, to wit:

"That said defendant, under and by virtue of the law and ordinances in force and applicable thereto, duly made and constituted an assessment district, immediately after the execution of said contract and prior to the completion thereof, consisting of the property fronting on said improvement and established boundaries of such district embracing the property abutting on said improvement portion of said Washington Street, and filed a plat of said street so to be improved and the real estate subject to assessment therefor and duly complied with all the requirements of the law and ordinances making a valid assessment of said property, and duly equalized the same and caused the same to be extended upon the assessment-roll, prepared duplicate assessment-rolls and placed the same in the hands of the proper officer for collection."

4½. That the special assessments described and referred to in said causes numbered respectively 1258 and 1538 were duly and regularly made and a part of such assessments were collected by the proper officer and all moneys acknowledged in the complaints in said causes to have been paid on said street grade warrants sued on in said causes were collected from such special assessments and not otherwise. [59]

5. That before any of the actions hereinbefore mentioned were commenced in said Superior Court, there were outstanding street grade warrants drawn on special funds of local improvement districts in said City of Port Townsend amounting to about $130,000, including the warrants sued on in said actions; that the said actions hereinbefore mentioned were commenced against said city and the said city was served with summons and complaint, and appeared in said actions by its officers and pretended to defend said suits, but in fact did not do so, but the said officers and the said City Council came to an understanding with the plaintiffs in said actions whereby the said [60] plaintiffs were allowed to prosecute their said actions to judgment without proper defense, and whereby the said City Council and the said city officers agreed with the said plaintiffs in said action and with the plaintiffs in other actions brought on like street grade warrants, and with all the holders of such street grade warrants outstanding as aforesaid, that they would not and that the City would not make any defense against the said actions and would not defend against nor appeal from any judgment that might be rendered

against the said City on such street grade warrants, and would allow all future actions on such street grade warrants to go by default and would not make any defense to future actions brought on such warrants; but would issue in lieu of judgments acquired in the said actions herein mentioned and in other actions then pending on such street grade warrants and in lieu of such default judgments, warrants drawn on the Indebtedness Fund of said city, bearing six per cent interest; that in pursuance of said understanding and agreement the warrants sued on herein together with all the other warrants mentioned in plaintiff's complaint together with a large amount of other warrants issued in lieu of default judgments, in all amounting to about the sum of $100,000, were ordered and issued by the said City Council during the year 1898, and some of the said default judgments were rendered as late as December, 1898.

6. That afterwards and in January, 1899, while there were still outstanding street grade warrants of the kind and character hereinbefore described, and of the kind and character upon which the judgments in said causes numbered, respectively, 1258 and 1538 were rendered, in the sum of about $30,000, which had not yet been reduced to judgment, the said City refused to recognize the said Indebtedness Fund warrants so issued as aforesaid as valid claims against the said City and refused to allow any more of the said street grade warrants to go to judgment; that such other street grade warrants not reduced to [61] judgment in the year 1898 are still outstanding and no action has ever been taken by the holders

thereof for collection; that the said City has ever since refused to recognize the said warrants so issued on said Indebtedness Fund as valid claims against the City, and all of the special levies made by said City for said Indebtedness Fund mentioned and described in said plaintiff's complaint, were so made and collected by said City for the purpose of paying off certain warrants drawn on the Fire and Water, Road, Light, and General Expense, Fund, of said City, which said warrants were outstanding and unpaid on February 1, 1898, and which by and act of the legislature of the State of Washington, entitled "An Act relating to the taxes and funds of municipal corporations having less than twenty thousand inhabitants, approved March 16, 1897," became legally payable out of said Indebtedness Fund from and after February 1, 1898.

7. That long before any of the said street grade warrants were reduced to judgment, long before the said City Council ordered any of the warrants mentioned and described in said complaint drawn on the said Indebtedness Fund and long before they were actually so drawn and long before the said City Council and the said city officers came to an understanding and an agreement with the said street grade warrant holders as hereinbefore alleged, and on July 9, 1897, the Supreme Court of the State of Washington, in the case of German American Savings Bank vs. The City of Spokane, reported in 17 Wash. at page 315, had decided that under no circumstances can a city be held liable on a street grade warrant

such as were involved in said causes numbered, respectively, 1258 and 1538 of the Superior Court, described in said complaint and the said City Council and the City Attorney of said City had full knowledge of said decision, and after and before the several judgments in the said causes Nos. 1258 and 1538 had been rendered and before the said Indebtedness Fund warrants sued on herein or any such Indebtedness Fund warrants [62] were ordered by said City Council and before any of the same were issued, and before the time for appeal from the judgments in said causes had expired, the said City Council was fully advised by other competent counsel than the City Attorney of said City, that the said City had a good and perfect defense to all actions brought on such street grade warrants, and good grounds for appealing from the said judgments so rendered, but notwithstanding the said decision and said information and said advice, the said City Council issued the said Indebtedness Fund warrants in satisfaction of said judgments and refused to appeal from said judgments and from other judgments that had already been rendered and refused to defend future actions brought on such street grade warrants of a similar nature and allowed all such actions to go by default until about January, 1899, as hereinbefore alleged.

8. That at and before the time the said agreement was made, the said judgments rendered, and the said Indebtedness Fund warrants issued, the said City of Port Townsend, was indebted beyond its constitutional limit of indebtedness for other purposes; that the total assessed valuation of all property tax-

able in said City according to the assessment for city purposes was $1,541.426 for the year 1897, and $1,532,056 for the year 1898; that the total amount of indebtedness of said City at all times during the years 1897 and 1898, before the issuance of any of the said Indebtedness Fund warrants, and exclusive of any of said warrants and exclusive of any and all street grade warrants, was over the sum of $200,000, exclusive also of any indebtedness for supplying said City with water, artificial light or sewers, and that said City did not own or control any works for supplying such water, light or sewers before the year 1905; and that the total assets of said City, including the full amount of all uncollected taxes, penalties and interest due said City and assets of every other kind and nature including moneys from all sources and [63] cash on hand, did not at any time during the said year 1897 or during the year 1898, exceed the total sum of $100,000.

9. That at no time has the assent of three-fifths of the voters of said city voting at any election, been had in any manner whatever for the purpose of incurring any part of the said $130,000 street grade warrant indebtedness or any part of the said Indebtedness Fund warrants issued, nor has any part of said street grade warrant indebtedness of $130,000 or any part of the said Indebtedness Fund warrant indebtedness ever been in any manner authorized by any of the voters or electors of said city, nor by any of the officers or authorized representatives of said city except as hereinbefore set forth.

10. That all of the said warrants sued on herein and all of the warrants mentioned in said complaint were ordered by the said City Council on February 17, 1898, at an adjourned meeting *of an adjourned meeting* of said council, and not at a regular meeting of said council as required by law; that such adjournments were taken without stating the purpose of the same, and that at time the regular meetings of the said City Council were fixed by Ordi-

585

nance No. [470] of said city for the first and third Tuesdays of each month.

11. That the said judgments in the said causes numbered, respectively, 1258 and 1538 of said Superior Court were obtained by fraud and were rendered without jurisdiction and without authority of law and the said warrants sued on herein were issued clandestinely and in fraud of the citizens and taxpayers of said city and without authority of law and in direct violation of the decision of the Supreme Court of the state. [64]

As a second affirmative defense to this action defendant alleges as follows:

1. Defendant repeats and makes part of this affirmative defense each and every allegation contained in paragraphs one, two and three of the first affirmative defense herein.

2. That the said plaintiff did not commence the said action within the time required by law; that the said warrants described in plaintiff's complaint and sued on herein were issued on February 18, 1898, by order of the City Council made on Febru-

ary 17, 1898; that in January, 1899, and afterwards, the said City of Port Townsend declared the said warrants illegal and invalid and refused to take any steps whatever to provide a fund for the payment of the same and refused to pay the same and refused to make a levy for the purpose of paying them; that such action of said council was spread upon the minutes of the council and made a matter of public record; that plaintiff and plaintiff's assignor well knew or by the exercise of reasonable diligence should have known of such action; and defendant further alleges that at the time the amended complaint herein was filed and served the time for bringing the said action had wholly expired and the statute of limitations had run against the said cause of action in said amended complaint set forth.

Where defendant prays that it may go hence without *day* and that it recover its costs and disbursements herein.

U. D. GNAGEY,
City Attorney. [65]

State of Washington,
County of Jefferson,—ss.

Harvey L. Tibbals, being first duly sworn, on oath says that he is the Mayor of the City of Port Townsend; that he has heard the foregoing answer of the said defendant city read, knows the contents thereof and believes the same to be true.

HARVEY L. TIBBALS.

Subscribed and sworn to before me this 13th day of Jan. 1912.

[Seal] U. D. GNAGEY,
Notary Public in and for the State of Washington,
Residing at Port Townsend, Wash.

Copy approving answer received and due service hereof accepted this 15th day of Jan., 1912.

J. A. BENTLEY,
Atty. for Pltf.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 15, 1912. A. W. Engle, Clerk. By ————, Deputy. [66]

In the United States Circuit Court, Western District of Washington, Northern Division.

No. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

CITY OF PORT TOWNSEND,

Defendant.

Appearance of Charles E. Shepard, and Notice Thereof.

Now comes Charles E. Shepard, a member of the bar of this court, and at the request of both the plaintiff and the plaintiff's present attorney of record, J. A. Bentley, Esq., enters his appearance as one of the attorneys of the plaintiff.

Dated at Seattle, Washington, April 22, 1912.

CHARLES E. SHEPARD.

To the Said Defendant and U. D. GNAGEY, Esq., Its Attorney:

You will please take notice that I have entered my appearance as above set forth as an associate attorney, with J. A. Bentley, Esq., for the plaintiff, and that all papers herein may be served upon me at my office, No. 614 New York Building, Seattle, Washington.

CHARLES E. SHEPARD,

Copy of within appearance and notice received and due service hereby acknowledged this 22d day of April, 1912.

U. D. GNAGEY,
Attorney for Defendant.

[Indorsed]: Appearance of Charles E. Shepard and Notice. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 23, 1912. A. W. Engle, Clerk. By S., Deputy. [67]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Allowing Amendments to Answer to be Filed.

The defendant presenting certain amendments to its answer which were heretofore allowed in open court by consent of counsel for plaintiff, it is now ordered that the said amendments be approved and the clerk is hereby directed to file the same as a part of defendant's answer.

Done in open court this 24th day of April, 1916.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order Allowing Amendments to Answer to be Filed. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 24, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [68]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Amendments to Answer.

Comes now the defendant herein and after leave of court first had and obtained in open court and by consent of attorney for plaintiff, files the follow-

ing amendments to its answer in order to clearly designate the parts of the complaint admitted by the original answer on file herein, that is to say:

1. That part of the complaint admitted in the first paragraph of defendant's answer reads as follows:

"The plaintiff by leave of the court amending the complaint in the above-entitled action, for an amended complaint, shows that the matter in dispute in this action exclusive of interest and costs, exceeds the amount of two thousand dollars; that the plaintiff is a banking corporation organized under the laws of the United States, and is located and doing business at Central City, State of Colorado; and the City of Port Townsend, defendant, is a municipal corporation, a city of the third class, in the County of Jefferson, State of Washington, and at all the times herein mentioned had and still has less than twenty thousand inhabitants."

2. Those parts of the complaint admitted in paragraph two of said answer read as follows:

"The plaintiff further shows that the warrants Nos. 116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145 and 146 were each issued payable to the above-named Bank of British [69] Columbia, or order; that on the 19th day of February, 1898, said last-mentioned warrants were each duly presented by the said Bank of British Columbia to the Treasurer of the City of Port Townsend for payment and payment thereof demanded; that said Treasurer refused to pay the same for want of funds and then and there so endorsed on

the back of each warrant."

"The plaintiff further shows that the warrants Nos. 49, 60, 100, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159 were each issued payable to the above-named Manchester Saving Bank or order; That on the 18th day of February, 1898, said last-mentioned warrants were each duly presented by said Manchester Savings Bank to the Treasurer of the City of Port Townsend for payment and payment thereof demanded; that said Treasurer refused to pay the same for want of funds and then and there so endorsed upon the back of each said warrant."

3. Those parts of the complaint admitted in paragraph three of said answer read as follows:

"The plaintiff further shows that in the month of May, 1910, and before the commencement of this action, it presented for payment each of said sixteen warrants to the Treasurer of said City of Port Townsend at his office in said city and demanded the payment thereof and the said Treasurer then and there refused to pay each and every of the said warrants."

"The plaintiff further shows that in the month of May, 1910, and before the commencement of this action it presented for payment each of said fourteen warrants to the Treasurer of said City of Port Townsend at his office in said city and demanded the payment thereof and the said Treasurer then and there refused to pay each and every of the said warrants."

4. That part of the complaint admitted in para-

graph four of said answer is as follows:

"The plaintiff further shows that the distinguishing numbers and the amounts for which said one hundred fifty-eight warrants were [70] drawn are respectively as follows, viz.:" (The said complaint then giving the number and amount of each of the said 158 warrants and then ending as follows:)

"Said warrants together amounting to sixty-seven thousand, four hundred eighty-three dollars and forty-seven cents ($67,483.47)."

5. That part of the complaint admitted in paragraph five of said answer reads as follows:

"The plaintiff further shows that the indebtedness of said City of Port Townsend, which at the time of the issue of the said one hundred fifty-eight warrants was entitled to be paid out of money belonging to the indebtedness fund, before any money then in that fund or which should thereafter come into the same would be applicable to the payment of the said one hundred fifty-eight warrants in numerical order, has been paid, except about three hundred dollars, all of which unpaid indebtedness was called in for payment prior to January, 1909."

"The plaintiff further shows that the said City of Port Townsend has levied taxes for the payment of indebtedness from the Indebtedness Fund of said city as follows, viz.:

"In October, 1898, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

"In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

"In October, 1901, 1–55/100 mill on the dollar upon a property assessment of $1,067,932.00.

"In October, 1902, 1–55/100 mill on the dollar upon a property assessment of $855,870.00.

"In October, 1903, 1–55/100 mill on the dollar upon a property assessment of $869,973.00. [71]

"In October, 1904, 1 mill on the dollar upon a property assessment of $936,214.00.

"In October, 1905, 1 mill on the dollar upon a property assessment of $960,907.00.

"In October, 1906, 1–50/100 mill on the dollar upon a property assessment of $1,030,480.00.

"In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00.

"In October, 1908, 1 mill on the dollar upon a property assessment of $1,291,142.00.

"And that said city has, since said last-mentioned levy, neglected and omitted to levy any tax for the payment of indebtedness from the Indebtedness Fund."

U. D. GNAGEY,
Attorney for Defendant.

State of Washington,
County of King,—ss.

U. D. Gnagey, being first duly sworn, on oath deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the amendments to the answer as set forth herein, knows the contents thereof and believes the same

to be true; that he makes this verification for and in behalf of the said defendant because all the facts therein stated are within his personal knowledge.

U. D. GNAGEY,

Subscribed and sworn to before me this 24th day of April, 1916.

L. B. STEDMAN,

Notary Public Residing at Seattle, Wash. [72]

[Indorsed]: Amendments to Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 24, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [73]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Allowing Amendment of Plaintiff's Reply.

This case came on for further hearing on this January 24, 1916, upon the settlement of the findings of fact and conclusions of law proposed by the respective parties, who were represented by their attorneys and counsel; and thereupon before the settlement and signing of the findings of fact and

conclusions of law the plaintiff applied for leave to amend its amended reply to the answer to correct a clerical error made by reason of inadvertence, and to make said amended reply conform to the facts in evidence, to wit, by amending paragraph No. 8 in the first division of said amended reply, on lines 24 to 30, inclusive, of page 2 thereof, so as to read as follows:

"8. The plaintiff admits the allegations in paragraph No. 10 of said answer, except that it says it has no knowledge or information sufficient to form a belief whether all of the warrants mentioned in the complaint were ordered by the City Council on February 17, 1898, and therefore denies the same, but it admits that all of the warrants which it owns and holds were ordered then at a meeting, but it denies that said meeting was an adjourned meeting of the City Council, as pleaded in said paragraph No. 10." [74]

Thereupon, after hearing counsel and on motion of plaintiff's attorney, IT IS ORDERED that said amendment be and is hereby allowed, and that said amended reply be henceforth treated as amended in said Paragraph 8 of the first division thereof. Deft. objects and excepts to such amendment which is noted.

Done in open court, this 24th day of January, 1916.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order Allowing Amendment of Plaintiff's Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 24, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [75]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Amended Reply.

Now comes the plaintiff, and by leave of Court first had and obtained, files its amended reply to the answer, and for such amended reply respectfully shows to the Court that:

I.

1. The plaintiff has no knowledge or information sufficient to form a belief as to the allegations in paragraph No. 4 of said answer, and therefore denies the same.

2. The plaintiff has no knowledge or information sufficient to form a belief as to the allegations in paragraph No. 4½ in said answer, and therefore denies the same.

3. The plaintiff admits that before any of the actions mentioned in the answer were begun there was outstanding a considerable amount of street grade warrants drawn on special funds for street improvement, and that the warrants held and owned by the plaintiff and sundry other warrants held and owned by other persons, drawn on the Indebtedness Fund, were issued in payment of judgments of the Superior Court of Washington in said Jefferson County, against the defendant herein, on such special improvement warrants, aggregating the amount of Sixty-seven Thousand Four Hundred Eighty-three and Forty-seven One-hundredths Dollars ($67,483.47), as set forth in the [76] amended complaint herein, but further than is herein admitted, the plaintiff has no knowledge or information sufficient to form a belief as to the allegations in said paragraph No. 5 of the answer, and therefore denies the same.

4. The plaintiff has no knowledge or information sufficient to form a belief as to any of the allegations in paragraph No. 6 of the answer, and therefore denies the same.

5. The plaintiff admits that on July 9, 1897, the Superior Court of the State of Washington rendered a decision in the case of German American Savings Bank vs. The City of Spokane, wherein the opinion of the Court is reported at page 315 of Vol. 17 of Washington Reports; but plaintiff denies that said decision was to the effect stated in paragraph No. 7 of said answer; and it further says that it has no

knowledge or information sufficient to form a belief as to the other allegations in said paragraph No. 7, and therefore denies the same and each thereof.

6. The plaintiff says that it has no knowledge or information sufficient to form a belief as to the allegations in paragraph No. 8 in said answer, and therefore it denies the same and each thereof.

7. The plaintiff has no knowledge or information sufficient to form a belief as to any of the allegations in paragraph No. 9 of said answer, and therefore denies the same and each thereof.

8. The plaintiff admits the allegations in paragraph No. 10 of said answer, except that it says it has no knowledge or information sufficient to form a belief whether all of the warrants mentioned in the complaint were ordered by the City Council on February 17, 1898, and therefore denies the same, but it admits that all of the warrants which it owns and holds were ordered then at an adjourned meeting, as pleaded in said paragraph No. 9.

9. Plaintiff denies each and every allegation in paragraph [77] No. 11 in said answer.

10. Plaintiff denies each and every allegation in the second paragraph of the second affirmative defense pleaded in said answer.

II.

And for its further and affirmative reply to said answer, the plaintiff shows to the Court that by the judgments of said Superior Court of the State of Washington in and for Jefferson County, which judgments were rendered in the actions mentioned in the answer, the City of Port Townsend was adjudged

to be indebted in sundry sums, as aforesaid, aggregating over Sixty-seven Thousand Dollars ($67,000.-00), to the sundry persons who were severally the plaintiffs in said actions; and by force of said judgments all matters of defense which were pleaded in said actions to the complaints of the several plaintiffs, and also all matters of defense which could have been pleaded thereto, became barred so that the same cannot again be pleaded or brought into controversy in this or any other court; and therefore the plaintiff avers, as it is advised and verily believes, that the defendant is estopped from pleading any of the affirmative matters and things which it has in its said answer set forth.

III.

And for its second and separate affirmative reply to said answer, the plaintiff also shows to the Court that among said actions brought in said Superior Court and mentioned in said answer there were four actions entitled:

Bank of British Columbia v. Port Townsend,
E. M. Johnson v. Port Townsend,
E. Heuschober v. Port Townsend,
First National Bank v. Port Townsend,

all of which were brought on street grade warrants of the character set forth in said answer; that said actions had been heard in said [78] Superior Court upon demurrers of the defendant therein to the complaints, and thereupon judgments sustaining said demurrers and dismissing the actions had been rendered by said Court, and the several plaintiffs had appealed therefrom to the Supreme Court of

Washington, which Court upon hearing reversed the judgments of the lower Court and held that the defendant city was liable to the plaintiffs upon their causes of action set forth in their complaints; that thereupon said Superior Court, pursuant to the mandate of the Supreme Court and after opportunity to the defendant to make, farther defense, rendered its several judgments in favor of said plaintiffs, and said judgments are four of the judgments mentioned in the answer against said city, and in payment whereof sundry of the Indebtedness Fund Warrants were issued; that by virtue of said judgments of the Supreme Court of Washington, and of said Superior Court, the liability of the defendant upon the street grade warrants, such as are mentioned in the answer and as were in suit in said four cases and in sundry other causes of said Superior Court mentioned in the answer, was adjudicated and established beyond controversy, and therefore the plaintiff avers, as it is advised and verily believes, that the defendant is estopped by force of said judgments from again contesting, in this or any other Court, the liability of the City upon the causes of action which passed into judgment as aforesaid, and for which the sundry Indebtedness Fund Warrants, numbered from 2 to 159, inclusive, were issued.

WHEREFORE, the plaintiff prays judgment against the defendant as it has heretofore prayed by its complaint.

CHARLES E. SHEPARD,
Plaintiff's Attorney. [79]

United States of America,
State of Washington,
County of King,—ss.

Charles E. Shepard, being sworn says: That he is the attorney for the plaintiff in the above-entitled action, and makes this verification in its behalf because the plaintiff is a nonresident corporation and none of its officers resides or is within this State; that he has read the answer of the defendant and the foregoing amended reply thereto, and knows the contents of said amended reply, and that said amended reply is true to the best of his knowledge, information and belief, and is true as he verily believes.

CHARLES E. SHEPARD,

Subscribed and sworn to before me, this 14th day of June, 1915.

[Seal] CLARK M. BURKHEIMER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within amended reply received and due service acknowledged this 19th day of June, 1915.

HASTINGS & STEDMAN,
Attorneys for Deft.

[Indorsed]: Amended Reply. Filed in the U. S. District Court, Western Dist. of Washington. Northern Division. June 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [80]

In the District Court of the United States for the Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Defendant's Proposed Findings of Fact.

This cause came regularly on for trial on the twenty-eighth day of April, 1915, before the Court without a jury, a jury trial having been duly waived by stipulation of the parties filing herein.

The plaintiff appeared by its attorney C. E. Shepard, and the defendants appeared by U. D. Gnagey, City Attorney, and L. B. Steadman, Esq. After the submission of the evidence offered by both plaintiff and defendant, the cause was submitted to the Court on such evidence and the stipulation of the parties filed herein, and upon the briefs and oral arguments of the respective parties, the Court on Saturday, December fourth, 1915, gave its decision in favor of the plaintiff and against the defendant and now makes the following findings of fact.

1. That the plaintiff, the First National Bank of Central City, a banking corporation, organized under the laws of the United States and is doing business at Central City, State of Colorado.

2. That the City of Port Townsend, Washington, was duly incorporated by the act of the legislative assembly of the Territory of Washington entitled "An Act to incorporate the city of Port Townsend" approved on the 28th day of November, 1881, and the act amendatory thereto entitled "An act to amend an act to incorporate the City of Port Townsend, Washington," approved November 28, 1883, and on August 16, 1896, the said city was duly re-incorporated under the general laws of the State of Washington as a city of the third class and ever since [81] said time has been and now is a city of the third class in said state.

3. On December 8, 1897, an action at law by the Bank of British Columbia, a corporation under the laws of the United Kingdom of Great Britain and Ireland, against the defendant herein, City of Port Townsend, for recovery of alleged damages for breaches of alleged contracts consisting of street grade warrants of the original character and terms hereinafter stated, was pending at issue in the Superior Court of the State of Washington in and for the County of Jefferson, that being the Court of general civil jurisdiction in that county. There had been a general appearance by the defendant and a waiver of jury trial of the issues of fact, and on that date the said cause together with seven other causes of similar street grade warrants came on for trial and were all tried on that day and the Court, at the close of the trial of said causes, announced a decision in favor of the plaintiff in said causes and against the defendant, City of Port Townsend. And on the

19th day of January, 1898, said Court signed findings in said cause of the Bank of British Columbia against the City of Port Townsend and also signed a judgment therein on said day and on February first, 1898, both the said findings and the said judgment were filed with the clerk of said court, that the said judgment was for the sum of $18,600.15 and the costs of the action with interest at 10% per year from the date on the judgment.

4. That among the eight actions at law described in the preceding paragraph was that of the Manchester Savings Bank, a corporation under the laws of the State of New Hampshire, against the defendant city herein for the recovery of alleged damages for breaches of alleged contracts consisting of street grade warrants of the origin, character and terms hereinafter stated was pending at issue on said December 18, 1897, and was tried on said day by the Court without a jury, a jury having been waived. The Court, as stated in the preceding paragraph, tried this cause and the seven other causes on said day and immediately after [82] the said trial on said day announced its decision in favor of the plaintiff and against the defendant city and on January 20, 1898 signed findings of fact in said cause which were filed with the clerk of the said court, February 2, 1898 and on February 5, 1898 judgment in said cause was signed and filed with the clerk of the court in the sum of $7,788.71 and costs of suit with interest at 10% per annum from date of judgment.

5. Each of said judgments was rendered for breaches of alleged contracts of said city which were so-called street grade warrants drawn on special improvement funds to be provided by special assessments on property improved and benefited by such street improvements, pursuant to proper ordinances of said city. The local improvement districts were formed, the contracts awarded, the improvements made, the special funds created and the warrants issued on such funds and those which were in suit in said two actions came by endorsement and transfer to the possession and ownership of the respective plaintiffs. Said warrants were not paid in full and by *there* terms there was due on them to said plaintiffs the respective amounts adjudged but the sums paid on them were paid out of such special improvement funds and not otherwise.

6. The following is the form of said special assessment or street grade warrants, and the individual warrants involved in said two suits differed only in number, date, amount and payee's name, to wit:

No. ——.

City of Port Townsend, W. T.——.

A. D. 188—.

By order of the City Council of —— of ——, A. D., 188— the Treasurer of the City of Port Townsend, Washington Territory; Pay to ——, or Order, —— Dollars and charge the same to the account of —— Street Improvement Fund. The City of Port Townsend hereby guarantees the payment of said sum of

—— Dollars with interest thereon at Ten per cent (10%) per annum payable semi-annually.

_____,

Mayor of the City of Port Townsend. [83]

7. No contract, ordinance or resolution authorized the City of Port Townsend to guarantee the payment of said warrants.

8. Besides the two actions just described, sundry other actions, to wit: Six in number were brought by other holders of similar special assessment or street grade warrants for street improvements in the City of Port Townsend against said City in said Superior Court, in each of which the City appeared and answered, and all of which said actions came on for trial on said December 18th, and were tried as alleged in paragraph three hereof and resulted in judgment against the City and the said warrants sued on in said actions were in their origin, forms and legal relations identical with those in said two actions just described, with the exception that they were drawn on different street improvement funds, and on the face of some there appeared no guarantee of payment by the City and on the face of others there appeared a guarantee by the City for the payment of interest only, but as in other cases no contract ordinances or resolution authorized the City or its officers to make such guarantee. The findings and judgment in four of said cases including the Bank of British Columbia case were signed January 19, 1898 and filed with the clerk of the court February 1, 1898, and the findings in the four other cases including the case of the Manchester Savings Bank

were signed on January 20, 1898 and filed with the clerk of the court February 5, 1898 and the judgment in said four cases were signed and filed February 5, 1898. The total amount of all of the said judgments including the eight cases described amounted to the sum of about $65,000.

9. That afterwards, during the year 1898, the said City Council allowed all actions on street grades warrants to go to judgment by default and the City paid all of such default judgments by warrants drawn on the Indebtedness Fund and continued so to do until an additional amount of about $30,000 Indebtedness Fund warrants had been issued, making in all about the sum of $95,000. [84]

10. From and after January, 1899, when a change in city officers occurred, the new City Council refused to allow any more defaulted judgments to be taken against the City on any street grade warrants or special assessments warrants of the kind and character hereinbefore described, of which there were still a considerable quantity outstanding and successfully contested all suits on such warrants and appealed from the judgments taken on such warrants in all cases where the time for appeal had expired.

11. Negotiations between the City and the plaintiffs in the eight cases mentioned and described, looking to a settlement of said claimed liabilities, were opened. The City Council held a regular meeting on February 15, 1898, that being the third Tuesday in said month, according to ordinance number 585 entitled "An Ordinance fixing the time of meeting

of the Common Council of the City of Port Townsent, Washington, and repealing Ordinance number 470 and all other ordinances on that subject" passed by the Common Council of the City of Port Townsend, Washington, November 19, 1895, and approved by the Mayor November 21, 1895, which said ordinance fixed the times of the regular meeting of said Council on the first and third Tuesdays of each month, at the hour of eight o'clock, from April to October inclusive and from December to March inclusive at the hour of one-half after seven o'clock. At the meeting so held on February 15, 1898, all the members of said Council and the Mayor and City Attorney were present at said regular meeting. Under the heading of New Business, the clerk read notice of attorneys in street grade warrant cases, but what such notice consisted of is nowhere disclosed by the record; after the reading of such notice and the transaction of other business in no way connected with such matter, the City Council took an adjournment of the meeting until three o'clock P. M. of the next day without stating the object or purpose of the adjournment. The Council met in pursuanc*t* of said adjournment when all the members were again present; at said adjourned meeting the said Council discussed the matter of [85] paying the street grade warrant judgments and after such discussion passed the following resolution and then adjourned until the next day to wit:

"Whereas judgment has been duly entered in the Superior Court of the State of Washington, for Jefferson County, against the City of Port Town-

send, in favor of the following named parties, for the following amounts respectively, to wit:

Merchants Bank of Port Townsend	$14,375.28
Manchester Savings Bank	7,788.71
Commercial Bank of Port Townsend	10,324.44
John Barneson	4,587.33
Bank of British Columbia	18,800.00
E. M. Johnson	1,812.23
First National Bank of Port Townsend	7,625.00
E. Heuschober	482.65
Alonzo Elliott	1,400(about)

Together with costs and interest from date of judgments at 10% per annum.

And whereas the said parties have duly presented the said claims under said judgments against the city to the City Council, for settlement and payment;

And whereas it is the opinion of the said Council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, Therefore, be it resolved by the City Council of the City of Port Townsend that said claims and judgments be and the same are hereby allowed and ordered paid as claims against the said City and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "Indebtedness Fund" of said City, which warrants shall be signed by the City Clerk and

Mayor and with the city seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same and until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named on or before February 17'' at 3 o'clock P. M. . . . ''

12. Thereupon and on the next day the judgment creditors, named in the resolution and there being represented, filed the following acceptance of the City's proposition made the day before and embodied in said resolution, viz.:

Port Townsend, Wash., Feby. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

Gentlemen:

We, the undersigned judgment creditors of the said City [86] of Port Townsend, hereby agree to accept and do hereby accept the proposition of the said City and its Council made on the 16th day of February, 1898, to satisfy and pay our respective judgments against the said City by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the ''Indebtedness Fund'' of said City, and to bear interest from the date of their issue at the rate of six (6) per cent per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jef-

ferson County, Washington upon the receipt of said warrants.

BANK OF BRITISH COLUMBIA OF VICTORIA, B. C.,
FIRST NATIONAL BANK OF PORT TOWNSEND,
E. M. JOHNSON,
EMIL HEUSCHOBER.
By MORRIS B. SACHS,
Attorney of Record in Said Causes for Said Judgment Creditors.
THE MERCHANTS' BANK OF PORT TOWNSEND,
THE COMMERCIAL BANK OF PORT TOWNSEND,
JOHN BARNESON,
MANCHESTER SAVINGS BANK,
By W. W. FELGER,
Attorney of Record in Said Causes for Said Last Four Named Judgment Creditors.
ALONZO ELLIOTT,
By PRESTON, CARR, GILMAN,
R. W. JENNINGS,
His Attorney.

In pursuance of said resolution and acceptance the City Officers on the next day issued "Indebtedness Fund Warrants" all bearing date February 18, 1898, numbered from 2 to 159, both inclusive, in satisfaction of such judgments, without appealing therefrom.

13. All of said warrants were inscribed on engraved blanks of the City of Port Townsend, signed by persons who were, on their dates, the Mayor and

the City Clerk of the City of Port Townsend, marked on their face in red ink "Indebtedness Fund," and the following is the form of each warrant:

$——. Port Townsend, Wash. ——, No. ——

By order if City Council ——, A. D. 18—, of the City of Port Townsend, Wash., the Treasurer of said City will pay ——, or order, —— Dollars, for pt. satisfaction of judgment, case, vs. City, with interest at six per cent per annum.

"Indebtedness Fund."

D. H. HILL,
Mayor of the City of Port Townsend.
AUGUST DUDDENHAUSEN,
City Clerk.

14. The warrants Nos. 29, 30, 31, 33, 34, 41, 42, 54, 55, 65, 66, 89, 90, 91, 92, 93, 107, 108, 109, 110, 111, 121, 122, 123, 124, 135, 137, 147 and 148 were all presented to the City Treasurer on February 18, 1898, and payment demanded, and he then refused payment and stamped each: "Presented February 18, 1898, not paid for want of funds" and signed "John [87] Sichenbaum, City Treasurer," and Nos. 116–120, 128–133, 142–146, all numbers inclusive, and 149, were so presented and refusal dated "February 19, 1898"; and said warrants in this sentence enumerated were, in the ordinary course of the plaintiff's business, assigned and transferred to it and have ever since then been owned by it.

15. Nothing has been paid on any of said warrants. Warrant No. 1 of said series was not issued for any indebtedness growing out of any street improvement and was paid before this action was be-

gun. Warrant No. 2 was issued to Alonzo Elliott in payment of a judgment against the city on a street improvement warrant and has been paid in pursuance of a judgment of this court in the case of David Perkins vs. Charles L. Intermela, Treasurer, since this action was begun, amounting with interest and costs to $3,467.63. Nothing has been paid on any of the other warrants in said list above enumerated.

16. Since the issue of said warrants above listed, the defendant has levied taxes for the payment of indebtedness from the Indebtedness Fund of said City in pursuance of Chapter 84 of the Session Laws of the Legislature passed at the session of 1897, as follows:

In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

In October, 1901, 1 55/100 mill on the dollar upon a property assessment of $1,067,932.00.

In October, 1902, 1 55/100 mill on the dollar upon a property assessment of $855,870.00.

In October, 1901, 1 55/100 mill on the dollar upon a property assessment of $869,973.00.

In October, 1904, 1 mill on the dollar upon a property assessment of $936,214.00.

In October, 1905, 1 mill on the dollar upon a property assessment of $960,967.00. [88]

In October, 1906, 1 50/100 mill on the dollar upon a property assessment of $1,030,480.00.

In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00.

In October, 1908, 1 mill on the dollar upon a prop-

erty assessment of $1,291,142.00.

No levy for the payment of indebtedness from the Indebtedness Fund under said statute or otherwise, has been made since the levy of 1908. But the levies that were so made were not made to pay any of the series of warrants known as "Indebtedness Fund Warrants" but were made solely to pay other warrants outstanding on February 1, 1898, and by the Act of 1897 creating the Indebtedness Fund payable out of such fund.

17. The following is a list by years from 1898 to 1913, inclusive, of the assessed valuation of Port Townsend property, its levy for the Indebtedness Fund when any such levy was made, and the tax charged against the property for such levy:

Year.	Assessed Valuation.	Levy for Gen. Indebtedness.	Computed Amount Realized.
1898	$1,516,567.00	.1	$ 151.66
1899	1,466,910.00	.1	146.69
1900	1,161,685.00	.4	464.67
1901	1,172,071.00	1.55	1816.71
1902	885,870.00	1.55	1328.60
1904	936,214.00	1.0	936.21
1905	960,697.00	1.0	960.70
1906	1,030,480.00	1.5	1545.72
1907	1,181,323.00	2.0	2362.65
1908	1,290,942.00	1.0	1290.94
1909	1,292,404.00		
1910	1,317,201.00		
1911	1,364,936.00		
1912	1,365,235.00		
1913	1,391,639.00		

18. That on September 13, 1906, the City of Port Townsend passed an ordinance number 722, entitled "An Ordinance to define the duties of the City Treasurer of the City of Port Townsend, section nine of which said ordinance reads as follows, to wit: "It shall be the duty of the [89] *of the* City Treasurer to turn into the 'indebtedness fund' all moneys derived by the city from the County of Jefferson for its share of the proceeds of the sale of any county property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt into the respective funds of the city, according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the City Treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council."

19. On February 1, 1898, there were the following amounts of warrants outstanding and unpaid on the different funds mentioned in Section 9 of said ordinance No. 722, to wit: On the Fire & Water Fund, the sum of $891.35; on the Road Fund, the sum of $2,016.27; on the Light Fund, the sum of $6,680.25; on the General Expense Fund, the sum of $31,150.70, the several sums herein given representing the fact value of said warrants. That during the years 1897 and 1898 there were practically the same amount of

warrants outstanding on the different funds herein mentioned.

20. Besides the foregoing warrants there were outstanding certain other warrants, amounting in all, principal and interest, on the 1st day of October, 1895, to the sum of $53,300.00, $29,100 of which were exchanged for municipal bonds issued by authority of a popular election validating said $53,300 and the remainder of said warrants consisting of $24,200, with interest, became payable out of the Indebtedness Fund according to the act of 1897 creating said fund.

21. On the first day of February, 1898, when the act of 1897 creating the Indebtedness Fund went into effect, the city had a large [90] amount of delinquent taxes outstanding for 1891, 1892, 1893 and 1894, which the City Treasurer afterwards proceeded to collect, and had also delinquent taxes for 1895 and 1896 outstanding. The City collected its own taxes for 1894 and previous years, but by an act entitled "An Act to provide for the assessment and collection of taxes in municipal corporations of the third and fourth class in the State of Washington, and declaring an emergency" approved March 9, 1893, and by city ordinance No. 569 entitled "An Ordinance relating to the assessment and collection of taxes in the City of Port Townsend" approved March 20, 1895, the County Treasurer of Jefferson County was made the collector of city taxes for 1895 and subsequent years. In 1902 the County Treasurer, according to law, foreclosed the lien of the state and county taxes for 1891, 1892, 1893 and 1894, and the state, county and city taxes for 1895. The foreclosure proceedings

resulted in the forfeiture of a large amount of property to the county, and the deed for the same to the county was filed with the County Auditor on January 12, 1903. At said time the delinquent taxes of the city that remained uncollected for 1895, amounted to $3,450.12. Afterwards the County Treasurer foreclosed the lien of the state, county and city taxes for 1896, which resulted in the forfeiture of property to the county and the deed to the county for said property was executed and filed with the auditor of said county on the —— day of ——; that at the time the said property was so forfeited to the county, the delinquent city taxes for 1896, that remained uncollected amounted to $4,284.79.

22. When said judgments above mentioned were entered and the Indebtedness Fund warrants issued in payment thereof, the city was indebted beyond its constitutional limit of indebtedness, exclusive of said warrants and of any indebtedness for supplying the city with water, artificial light or sewers, and it did not own or control any works for supplying water, light or sewers until the year 1905, and the total assets of the city including all uncollected taxes, penalties and interest due the city, money from all sources and cash on [91] hand, were not sufficient, during any part of the years 1897 or 1898, to bring the city within its constitutional limit of indebtedness.

23. At and before any of the cases herein mentioned came on for trial, the Supreme Court of Washington had decided the case of the German-American Savings Bank of the City of Spokane reported in

17 W. 315, and the said attorney of said city, S. A. Plumley, at and before said time had full knowledge of said decision and the said decision and its effect on said street grade warrants was a matter of common knowledge at and before said time among the attorneys in said City of Port Townsend.

24. The Court further finds that the regular meeting of the City Council held in pursuance of the Ordinance of said city on February 15, 1898, was a short meeting, and at said meeting there came up for transaction less business than was usually transacted at the regular meetings of said Council, and that the said Council adjourned from the 15th to the 16th, and from the 16th to the 17th, not because so much business came up for transaction that the same could not all be transacted at the said regular meeting, but because business that the said Council desired to transact was not yet right for transaction. [92]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Stipulation Waiving Jury Trial.

It is hereby stipulated between the parties, by their attorneys, that a trial of the issues in this action before a jury is hereby waived by both parties, and that the case may be set for trial at the pending term, on such date as may be fixed by the Court.

Dated May 22, 1914.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

U. D. GNAGEY,
Attorney for Defendant.

[Indorsed]: Stipulation Waiving Jury Trial. Filed in the U. S. District Court, Western Dist. of Washington. May 26, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [93]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on for trial before the Court with-

out a jury, on April 28, 1915, after a written waiver of a jury trial by both parties was filed; and the plaintiff appeared by Charles E. Shepard, its attorney, and the defendant by U. D. Gnagey, its attorney, and L. B. Stedman, of counsel; and upon the evidence submitted by the parties, and after consideration thereof, and of the oral arguments and the briefs presented to the Court in their behalf respectively, the Judge of this court now makes and files the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. The plaintiff is and has been ever since January 1, 1898, a banking corporation organized under the National Bank Act of the United States and located at Central City in the State of Colorado.

2. The defendant is and has been ever since August 16, 1896, a municipal corporation under the general statute for incorporation of cities in the State of Washington and classified thereunder as a city of the third class, that is, as of a population of 20,000 or less, and is located in the County of Jefferson therein.

3. On February 1, 1898, in an action then pending and at [94] issue in the Superior Court of the State of Washington in and for Jefferson County, which was and is a court of general jurisdiction for the trial of civil actions, and in which action the Bank of British Columbia, a corporation organized under the laws of the Kingdom of Great Britain and located and resident at Victoria in the Province of British Columbia was the plaintiff and the City of Port

Townsend was the defendant, said Superior Court, upon the previous appearance of the parties before it and on evidence submitted to the Court, duly rendered a judgment at law in favor of said plaintiff and against said defendant for the sum of eighteen thousand six hundred dollars and fifteen cents as the debt due to said plaintiff and for the costs and disbursements of the action; and said judgment, by its terms, bore interest at ten per cent per annum from its date.

4. On February 5, 1898, in an action then pending and at issue in said Superior Court in and for said Jefferson County, brought by Manchester Savings Bank, a corporation organized under the laws of the State of New Hampshire, and located and resident at the City of Manchester therein, as the plaintiff against said City of Port Townsend as the defendant, said Superior Court, upon the previous appearance of the parties before it and on evidence, submitted to the Court, duly rendered, a judgment at law in favor of the plaintiff and against the defendant therein for the sum of seven thousand seven hundred eighty-eight dollars and seventy-one cents, as the debt due to said plaintiff, and for the costs and disbursements of the action; and said judgment, by its terms, bore interest at ten per cent per annum from its date.

5. The warrants upon which said actions were based were so-called street grade warrants drawn upon special improvement funds to be paid out of special assessments on the property improved and benefited by such street improvement. Local improvement districts were formed and contracts

awarded and such improvements were made, special funds were created and warrants were issued on such funds, and such warrants so issued became the property of the Bank of British Columbia and the Manchester Savings Bank, plaintiffs in said actions.

6. There was no contract, ordinance or resolution passed by the City Council of the City of Port Townsend which authorized the City of Port Townsend to guarantee the payment of said warrants.

7. On February 17, 1898, the Mayor and the City Council of Port Townsend, being its governing and administrative authorities, unanimously decided to pay said two judgments, being then unpaid, by the issue to said respective judgment creditors of the appropriate [**95**] amounts of warrants of said city, drawn against the Indebtedness Fund of the City and which warrants were to draw interest at six per cent per annum until their payment. Said judgment creditors accepted the offer of the City to that effect.

8. Said City at the same time was making a like disposition of sundry other judgments then recently entered against it; and accordingly it issued against said "Indebtedness Fund" sundry warrants, serially numbered from No. 2 to No. 159, aggregating about Sixty-seven Thousand Dollars, all dated on February 18, 1898, and each of said warrants stated that it was issued in part satisfaction of a certain named judgment, according to the facts.

9. Of the warrants issued as aforesaid the following warrants in suit herein, were a part:

Number.	Amount.	Payee.
49	$500.00	Manchester Savings Bank
60	250.00	" " "
100	250.00	" " "
116	500.00	Bank of British Columbia
117	500.00	" " "
118	500.00	" " "
119	500.00	" " "
120	500.00	" " "
128	500.00	" " "
129	500.00	" " "
130	500.00	" " "
131	500.00	" " "
132	500.00	" " "
133	500.00	" " "
142	500.00	" " "
143	500.00	" " "
144	500.00	" " "
145	500.00	" " "
146	380.00	" " "
149	500.00	Manchester Savings Bank
150	263.50	" " "
151	500.00	" " "
152	500.00	" " "
153	500.00	" " "
154	500.00	" " "
155	500.00	" " "
156	500.00	" " "
157	500.00	" " "
158	500.00	" " "
159	309.30	" " "

10. All of said warrants were ordered to be issued by unanimous vote of the Mayor and City Council of the defendant, at a regular meeting thereof duly held according to the statute, and after deliberation on the subject of said judgments; and each warrant was signed by the Mayor and the City Clerk in the name of the City. The aggregate of the warrants issued to each of said judgment creditors was equal to the amount due on its judgment and no more.

11. Said warrants so numbered were for the respective amounts above stated and were payable to the Manchester Savings Bank, and the Bank of British Columbia respectively, as set forth in the seventh finding, and were delivered to the respective payees on their date.

12. Said warrants payable to the Manchester Savings Bank were presented by it to the City Treasurer of said City on February 18, 1898, for payment, but payment was refused for want of funds. Said warrants payable to the Bank of British Columbia were presented by it to said City Treasurer for payment, on February 19, 1898, but payment was refused for want of funds.

13. Said warrants enumerated in the ninth finding were purchased from said respective payees and paid for by the plaintiff, on different dates, but all in the year 1898, at their then fair market value, in the ordinary course of banking business, and without notice of any intention on the part of the defendant to contest their payment; and the plaintiff has ever since then held all said warrants as a part of its assets.

14. There was no fraud or fraudulent collusion or acquiescence in the payment of an unlawful claim, on the part of the Mayor and City Council in authorizing the payment of said judgments by said warrants, disclosed by the evidence, or in the acts of the Mayor and City Clerk in issuing said warrants. [97]

15. Since the issue of said warrants above listed, the defendant has levied taxes for the payment of indebtedness from the Indebtedness Fund of said city in pursuance of Chapter 84 of the Session Laws of the Legislature passed at the session of 1897, as follows:

In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

In October, 1901, 1–55/100 mill on the dollar upon a property assessment of $1,067,932.00.

In October, 1902, 1–55/100 mill on the dollar upon a property assessment of $855,870.00.

In October, 1903, 1–55/100 mill on the dollar upon a property assessment of $869,973.00.

In October, 1904, 1 mill on the dollar upon a property assessment of $936,214.00.

In October, 1905, 1 mill on the dollar upon a property assessment of $960,967.00.

In October, 1906, 1–50/100 mill on the dollar upon a property assessment of $1,030,480.00.

In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00.

In October, 1908, 1 mill on the dollar upon a property assessment of $1,291,142.00.

No levy for the payment of indebtedness from the Indebtedness Fund under said statute or otherwise, has been made since the levy of 1908. [98]

16. The defendant, since 1898, has realized from delinquent tax collections and the sales of land for taxes, contributory to its Indebtedness Fund, as specified in said Chapter 84, sundry sums to the credit of said fund, of which it has applied portions to the payment of all its outstanding indebtedness prior in rank to the warrants serially numbered from No. 2 to No. 159, as aforesaid; but certain other portions of the funds so received have been transferred from the Indebtedness Fund and used for other purposes, under orders of the City Council.

17. No call for any warrants drawn on the Indebtedness Fund except Nos. 1 and 160 has been issued, nor have any such warrants been paid except said two warrants and No. 2, which it paid pursuant to a judgment of this court in the cause entitled David Perkins vs. Charles L. Intermela, Treasurer, et al., No. 1931 at Law, being a warrant issued for a judgment of said Superior Court against said city, which was so paid by virtue of the same resolution of the City Council above-mentioned, and at the same time. Under the statutes of Washington, the time for action to recover or enforce the payment of municipal warrants does not begin until a call to present them for payment has been made and published.

18. There is now due to the plaintiff from the defendant upon the warrants enumerated in the

seventh finding, thirteen [99] thousand, nine hundred fifty-two dollars, eighty cents ($13,952.80), with interest at six per cent per year on six thousand seventy-two dollars, eighty cents ($6,072.80) thereof from February 18, 1898, and on seven thousand, eight hundred eighty dollars ($7,880.00) thereof from February 19, 1898. [100]

CONCLUSIONS OF LAW.

1. The warrants in suit are valid and subsisting liabilities of the defendant for the amount of their face and accrued interest from their respective dates of presentation and refusal to pay.

2. The defendant is estopped by the judgments in liquidation of which the warrants in suit were issued from relying on any defense which might have been pleaded to the actions in which those judgments were entered. The defenses that the defendant city was not liable on the causes of action sued on in said former actions and that it was already indebted beyond its constitutional limit of debt fall under this head.

3. It was the duty of the defendant to levy a property tax to the amount of six mills on the dollar of assessed valuation for the Indebtedness Fund, during every year beginning with 1898, and to apply the proceeds to their proper use according to law, until the warrants in suit with accrued interest were paid.

4. The plaintiff is entitled to judgment against the defendant for thirteen thousand, nine hundred fifty-two dollars, eighty cents with accrued interest

as stated in the eighteenth finding of fact, and with the costs of the action; and to the process of this court to enforce payment.

Let judgment be entered accordingly.

Seattle, January 31, 1916.

JEREMIAH NETERER,
District Judge.

Copy received 1–31–196.

L. B. STEDMAN,

[Indorsed]: Findings of Fact and Conclusions of Law. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 31, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [101]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Exceptions to the Refusal of the Court to Make Findings of Fact Requested by Defendant, and to the Findings as Made by the Court.

To the Honorable JEREMIAH NETERER, Judge of the Above-entitled Court:

Comes now the above-named defendant herein and

excepts to the refusal of the Court to make the findings of fact requested by the defendant and to the findings as made by the Court, as follows, to wit:

1.

It excepts to the refusal of the Court to make the second finding requested by the defendant in regard to the incorporation of said defendant.

2.

It excepts to the refusal of the Court to make the third finding requested by defendant upon the ground that the matters and facts therein to be found were matters and facts proven by the testimony and record.

3.

It excepts to the refusal of the Court to make the fourth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

4.

It excepts to the refusal of the Court to make the fifth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record. [102]

5.

It excepts to the refusal of the Court to make the seventh finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

6.

It excepts to the refusal of the Court to make the eighth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

7.

It excepts to the refusal of the Court to make the ninth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

8.

It excepts to the refusal of the Court to make the tenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

9.

It excepts to the refusal of the Court to make the twelfth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

10.

It excepts to the refusal of the Court to make the thirteenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

11.

It excepts to the refusal of the Court to make the

fifteenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record. [103]

12.

It excepts to the refusal of the Court to make the sixteenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

13.

It excepts to the refusal of the Court to make the seventeenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

14.

It excepts to the refusal of the Court to make the eighteenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

15.

It excepts to the refusal of the Court to make the nineteenth finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

16.

It excepts to the refusal of the Court to make the twentieth finding requested by the defendant, upon the ground that the matters and facts therein asked

to be found were matters and facts proven by the testimony and record.

17.

It excepts to the refusal of the Court to make the twenty-first finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

18.

It excepts to the refusal of the Court to make the twenty-second finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and [104] facts proven by the testimony and record.

19.

It excepts to the refusal of the Court to make the twenty-third finding requested by the defendant, upon the ground that the matters and facts therein asked to be found were matters and facts proven by the testimony and record.

20.

It excepts to the refusal of the Court to make the twenty-fourth finding requested by the defendant, upon the ground that the matters and facts herein asked to be found were matters and facts proven by the testimony and record.

21.

Said defendant excepts to the third finding of fact signed by the Court, especially that portion thereof which states that said judgment referred to therein was granted upon evidence submitted, and that said judgment was duly rendered, upon the

ground that the same was not supported by the facts in this cause.

22.

Defendant excepts to the third finding of fact as signed by the Court, upon the ground that the same was not supported by the facts in this cause.

23.

Defendant excepts to the tenth finding of fact as made by the Court, especially that portion thereof, which states that said warrants were ordered to be issued at a regular meeting of the City Council held according to statute, upon the ground that same is contrary to the evidence in this, to wit: that it appeared in the evidence that said order was made at an adjourned meeting of said City Council.

24.

Defendant excepts to the fourteenth finding as made by the Court, upon the ground that same is not a finding of fact but a conclusion of law. [105]

25.

Defendant excepts to the eighteenth finding of fact as made by the Court, upon the ground that the same is a conclusion of law, and the same states that there is due the sums therein mentioned from defendant, without the additional finding from what fund the same is due, and that said finding bears the possible interpretation of finding a general liability of the defendant and not one to be paid out of the moneys in the indebtedness fund of said defendant.

26.

Defendant excepts to the first conclusion of law, upon the ground that the same is not justified under

the law and the facts in this cause.

27.

Defendant excepts to the second conclusion of law signed by the Court, upon the ground that the same is not justified under the law or by the facts in this cause.

28.

Defendant excepts to the third conclusion of law, upon the ground that the same is not justified under the law and the facts in this cause.

29.

Defendant excepts to the fourth conclusion of law, upon the ground that the same purports to be a general judgment against the defendant and not a judgment to be paid out of special fund, upon which the warrants, involved in this litigation, were drawn.

U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

Copy received Jan. 31, 1916.

CHARLES E. SHEPARD,
For Pltf.

[Indorsed]: Exceptions to Refusal of Court to Make Findings Requested by Deft. and to Findings as Made by the Court. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 31, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [106]

In the District Court of the State of Washington for the Western District of Washington, Northern Division.

AT LAW.—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Judgment.

This cause having been heretofore brought on for trial of the issues joined herein, before the Court without a jury, after a written waiver of a jury trial by both parties, the Judge of this court having made and filed his findings of fact and conclusions of law ordered a judgment to be entered in favor of the plaintiff according thereto,

Now on motion of Charles E. Shepard, plaintiff's attorney,

It is adjudged that The First National Bank of Central City, Colorado, the plaintiff, do have and recover from the City of Port Townsend, the defendant, the sum of Twenty-eight Thousand Nine Hundred Seventy-eight Dollars and Sixty-nine Cents ($28,978.69) as the indebtedness due to the plaintiff upon the Indebtedness Fund Warrants issued by the defendant and in suit herein, and in addition thereto the taxable costs and disbursements of the

plaintiff to be taxed by the clerk, and that the plaintiff have process of this Court in its favor against the defendant for the collection of said indebtedness and costs, according to law and the practice of the court.

Done in open court this January 31, 1916.

JEREMIAH NETERER,
District Judge.

Copy received 1–31–1916.

L. B. STEDMAN.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 1, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [107]

In the District Court of the United States for the Western District of Washington, Northern Division.

NO. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY,
Plaintiff,

vs.

CITY OF PORT TOWNSEND,
Defendant.

Defendant's Exceptions to Judgment and Order.

Comes now the above-named defendant, City of Port Townsend, and excepts to the judgment dated herein on the 31st day of January, 1916, upon the grounds:

1. That said judgment is not warranted by the

findings of facts and conclusions of law filed herein;

2. Said judgment is not warranted by the facts in this cause;

3. That any judgment rendered herein should be a judgment to be paid out of the indebtedness fund of the City of Port Townsend and not a general judgment against the City of Port Townsend as rendered herein;

4. That the Court has not power upon indebtedness fund warrants to enter a general judgment against the City of Port Townsend;

5. That said judgment is contrary to law.

U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

The foregoing exceptions to the judgment were, by the defendant, presented to the Court and are now by the Court allowed, this 28th day of February, 1916.

JEREMIAH NETERER,
Judge. [108]

Service of the within Exceptions to Judgment by delivery of a copy to the undersigned is hereby acknowledged this 24th day of Feby., 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

[Indorsed]: Defendant's Exceptions to Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 28, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [109]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Allowing Defendant's Exceptions.

There having been presented to the Court this day the exceptions of the defendant to the failure of the Court to make certain findings of act and conclusions of law requested by the defendant, and the exceptions of the defendant to certain findings of fact and conclusions of law made by the Court, and the Court being duly advised in the premises;

It is here and now ORDERED that said exceptions be, and they, and each of them, are hereby allowed.

Done in open court this 31st day of January, A. D., 1916.

JEREMIAH NETERER,
Judge.

Copy received Jan. 31, 1916.

CHARLES E. SHEPARD,
For Pltf.

[Indorsed]: Order Allowing Defendant's Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division Jan. 31, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. **[110]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Stipulation Extending Time to March 1, 1916, to Prepare, etc., Proposed Bill of Exceptions.

It is hereby stipulated and agreed by and between plaintiff and defendant, through their respective attorneys, that defendant may have up to and including the first day of March, 1916, in which to prepare, serve and file its proposed bill of exceptions herein.

Dated at Seattle, Washington, this 7th day of February, A. D., 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.
U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 9, 1916. Frank L. Crosby, Clerk. By E. M. L. Deputy. **[111]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Extending Time to March 1, 1916, to Prepare, etc., Proposed Bill of Exceptions.

Upon stipulation of counsel, it is hereby ordered that defendant may have up to, and including, the first day of March, 1916, in which to prepare, serve and file its proposed bill of exceptions herein.

Done in open court this 9th day of February, A. D., 1916.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 9, 1916. Frank L. Crosby, Clerk. By E. M. L. Deputy. **[112]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Allowing Withdrawal of Bill of Exceptions, etc.

Now on this day this cause comes on for hearing on motion for Writ of Mandamus, and notice of settling Bill of Exceptions, the plaintiff appearing by Charles E. Shepard and the defendant by Hastings & Stedman, and U. D. Gnagey, whereupon the defendant states will petition for Writ of Error and ask Court to fix amount of cost bond and supersedeas bond. The Court fixes supersedeas bond at $650.00 and cost bond at $250.00. Defendant is allowed to withdraw original bill of exceptions, as lodged with clerk, to incorporate amendments.

Dated April 24, 1916.

Journal 5 Page 322. **[113]**

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff.

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Notice of Settling Bill of Exceptions.

To U. D. Gnagey, defendant's attorney, and to L. B. Stedman, of Counsel:

YOU WILL PLEASE TAKE NOTICE that the proposed amendments of the plaintiff to the bill of exceptions herein, which are herewith served on you, will be presented to the Court on April 24, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move that same be allowed and inserted in the proposed bill of exceptions.

Dated April 20, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

[Indorsed]: Notice of Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 21, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[114]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Defendant's Draft of Proposed Bill of Exceptions.

Be it remembered that this cause came on regularly for trial on the 20th day of April, 1915, before the Honorable Jeremiah Neterer, Judge presiding, for trial by the Court without a jury, a jury having been expressly waived by the parties, plaintiff appearing by Charles E. Shepard, Esquire, its attorney, and defendant appearing by U. D. Gnagey, Esquire, its attorney, and Hastings & Stedman, of counsel, the following proceedings were had.

Plaintiff, through its attorney, Charles E. Shepard, Esq., was about to address the Court when U. D. Gnagey, Esq., attorney for defendant, stated to the Court that the original complaint had been demurred to, upon the ground that it did not state facts sufficient to constitute a cause of action, and that such demurrer was sustained by Judge Cornelius H. Hanford, then presiding over this court, and that plaintiff, refusing to plead further, suffered a judgment of dismissal in this court, which said

judgment of dismissal was affirmed by the United States Circuit Court of Appeals, and had not been reversed upon the records so far as counsel knew, and Mr. Gnagey stated to the Court that defendant objected to the proceedings upon the ground that the judgment of dismissal had never been reversed. Whereupon, the Court stated that the ruling would be reserved, and the testimony would go into the record, and the Court would dispose of the whole matter at once, to which ruling of the Court the defendant took an exception, and its exception was allowed. **[115]**

By consent of the Court, the proof of the allegations in paragraphs 8 and 9 of the first affirmative defense set forth in defendant's answer was postponed to be furnished by testimony taken on depositions within two weeks. Permission was given by the Court at the request of the defendant to correct minor errors in the answer.

Whereupon, plaintiff offered in evidence the deposition of H. H. Lake, taken at Central City, Colorado, on April 10, 1915, who testified as follows:

Deposition of H. H. Lake, for Plaintiff.

Testimony of H. H. LAKE, witness for plaintiff.

I am 54 years of age; reside at Central City, Colorado, and have been cashier of the First National Bank of Central City since August 31, 1904. The plaintiff bank was in possession of the indebtedness fund warrants referred to in this action when I became cashier and until they were delivered to its attorney for purpose of this suit. These warrants

(Deposition of H. H. Lake.)

appear in the bank-book's account as assets of the bank, which has been the owner of them for years. The bank's records show that the warrants were purchased as follows: on March 23, 1898, $11,445.53; on June 30, 1898, $5,500.00; on July 14, 1898, $558.25; on July 15, 1898, $5,250.00; on July 21, 1898, $5,080.75. All of these warrants were purchased in the ordinary course of banking business, and the purchase price was paid in cash, and they have ever since stood upon the books of the bank as assets. Said warrants are now in possession of Charles E. Shepard, attorney for plaintiff, and for use in evidence. A list of the warrants owned by plaintiff is as follows:

No. 7, $308.15; No. 9, $487.00; No. 10, $96.30; No. 29, $500.00; No. 30, $500.00; No. 31, $500.00; No. 32, $500.00; No. 41, $500.00; No. 42, $500.00; No. 49, $500.00; No. 54, $250.00; No. 55, $250.00; No. 59, $250.00; No. 60, $250.00; No. 65, $500.00; No. 66, $500.00; No. 89, $250.00; No. 90, $500.00; No. 91, $500.00; No. 92, $500.00; No. 93, $308.25; No. 100, $250.00; No. 107, $500.00; No. 108, $500.00; No. 110, $500.00; No. 111, $500.00; No. 116, $500.00; No. 117, $500.00; No. 118, $500.00; No. 119, $500.00; No. 120, $500.00; No. 121, $500.00; No. 122, $500.00; No. 123, $500.00; No. 124, $500.00; No. 128, $500.00; No. 129, $500.00; No. 130, $500.00; No. 131, $500.00; No. 132, $500.00; No. 133, $500.00; No. 135, $525.53; No. 137, $420.00; No. 142, $500.00; No. 143, $500.00; No. 144, 500.00; **[116]** No. 145, $500.00; No. 146, $380.00; No. 147, $500.00; No. 148, $236.50; No. 149, $500.00;

(Deposition of H. H. Lake.)

No. 150, $263.50; No. 151, $500.00; No. 152, $500.00; No. 153, $500.00; No. 154, $500.00; No 155, $500.00; No. 156, $500.00; No. 157, $500.00; No. 158, $500.00; No. 159, $500.00.

On cross-examination, the witness stated that no one besides the First National Bank of Central City had any interest in the warrants, and that the bank is the absolute owner of them, and that he knew of nothing further of interest to either party in this action.

Whereupon, plaintiff, through its attorney, Mr. Shepard, offered in evidence the warrants in suit in this action, aggregating $13,952.80, the face of the warrants, which warrants were marked exhibit "A," and admitted in evidence in this cause. Objection was seasonably made by defendant, through Mr. Stedman, to the admission of these warrants in evidence, upon the ground that they were not properly endorsed to show title in plaintiff, which objection was overruled, and defendant was allowed an exception, and it was agreed by the Court and the parties that the objection should run to each and every warrant introduced and offered in evidence, and included in exhibit "A."

Whereupon, Mr. Shepard offered in evidence copy of the minutes of the City Council of Port Townsend on February 15, 16 and 17, 1898, or portions thereof, pertaining to the indebtedness fund warrant issue, which was identified as exhibit "B" of plaintiff. Objection to the introduction of a skeleton of the minutes was raised by Mr. Stedman, of counsel for

defendant, on the ground that a certified copy of the entire minutes should be introduced in evidence, and upon the ground that in the case of Perkins vs. Intermela, in the Circuit Court of Appeals, Judge Wolverton, in giving the decision, laid stress upon the fact that the meetings of the City Council had to be adjourned on account of press of other business; which objection was overruled by the Court. An exception was taken by defendant and allowed by the Court, and the complete and entire minutes were introduced in evidence and marked Plaintiff's Exhibit [117] "B," hereto attached.

Whereupon, plaintiff, through Mr. Shepard, referred the Court to the stipulation of facts signed by the parties, which is as follows:

"In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

STIPULATION OF FACTS.

For the purposes of the trial and of the record thereof in this cause and not otherwise, the parties, by their respective attorneys, hereby agree that the following facts pertinent to this action, and that

neither party shall be under necessity of adducing evidence of any fact herein stated. But each party reserves the right to object to the materiality or the relevancy of any such fact. And either party may offer at the trial any competent evidence of any other material or relevant fact at issue herein and not stated in this stipulation.

I.

The parties are such corporations as they are pleaded to be in the Amended Complaint and the Answer and were such before and on the date when this action was begun.

II.

On January 19, 1898, an action at law by the Bank of British Columbia, a corporation under the laws of the United Kingdom of Great Britain and Ireland, against the defendant herein, for recovery of alleged damages for breaches of alleged contracts consisting of Street Grade Warrants of the origin, character and terms hereinafter stated, was pending at issue in the Superior Court of Washington, in and for the County of Jefferson, that being the court of general civil jurisdiction in that county. There had been a general appearance by the defendant, and a waiver of a jury trial of the issues of fact. On said date, the Court by written findings and conclusions found the issues of fact and law in favor of the then plaintiff and on February 1, 1898, it entered judgment accordingly in favor of said plaintiff, Bank of British Columbia, and against said defendant City for eighteen thousand six hundred dollars, fifteen cents ($18,600.15) and the costs of the action,

with interest at ten per cent per year from the date of the judgment.

III.

On January 19, 1898, an action at law by the Manchester Savings Bank, a corporation under the laws of the State of New Hampshire, against the defendant herein, for the recovery of alleged damages consisting of Street Grade Warrants of the origin, character and terms hereinafter stated, for breaches of alleged contracts, was pending at issue in said Superior Court in and for said County of Jefferson. There had been a general appearance by the defendant and a waiver of a jury trial of the issues of fact. On said date, said Court by written findings of fact and conclusions of law found the issues of fact and of law in favor of the then plaintiff and on February 5, 1898, it entered judgment accordingly in favor of said Manchester Savings Bank and against said defendant City for seven thousand seven hundred eighty-eight dollars, [118] seventy-one cents ($7,788.71) and the costs of the action with interest at ten per cent per year from the date of the judgment.

IV.

Each of said judgments was rendered for breaches of alleged contracts of said City, which were so-called street grade warrants drawn on special improvement funds to be provided by special assessments on property improved and benefitted by such street improvements carried out by contractors pursuant to ordinance of said City, as alleged in the complaints set forth in the answer in this cause.

The local improvement districts were duly formed, the contracts awarded, the improvements made, and the warrants issued on such Funds and those which were in suit in said two actions came by indorsement and transfer to the possession and ownership of the respective plaintiffs; and the warrants were not paid in full and by their terms there was due on them to said plaintiffs the respective amounts adjudged, but the sums paid were from such special assessments, and not otherwise.

V.

The following is the form of said special assessment or street grade warrants, and the individual warrants involved in said two suits differed only in number, date, amount and payee's name, to wit:

No. —— City of Port Townsend W. T. ——
A. D. 188—

By order of the City Council of —— of ——, A. D. 188—, the Treasurer of the City of Port Townsend, Washington Territory; Pay to ——, or order, —— Dollars, and charge the same to the account of —— Street Improvement Fund. The City of Port Townsend hereby guarantees the payment of said sum of —— Dollars with interest thereon at Ten per cent (10%) per annum payable semi-monthly.

————————————,
Mayor of the City of Port Townsend.

VI.

No contract, ordinance or resolution authorized the City of Port Townsend to guarantee the payment of said warrants, and said warrants were issued under the ordinance and contracts pleaded in

the complaints fully set forth in the defendant's answer herein. Said answer contains true copies of said complaints, and true copies of said ordinances and contracts.

VII.

At about the same time the two actions just described were commenced which resulted in said judgments, sundry other actions, to wit, six in number were brought by other holders of similar special assessment or street grade warrants for street improvements in the City of Port Townsend against said city in said Superior Court, in each of which the city appeared and answered. Said warrants were in their origin, forms and legal relations identical with those in said two actions, with the exception that they were drawn on different street improvement funds and on the face of some there appeared no guaranty of payment by the city, and on the face of others there appeared a guaranty by the city for the payment of interest only, but as in the other cases, no contract, ordinance or resolution authorized the city or its officers to make such guaranty. All of said actions resulted in judgments against said city on the warrants in suit therein about [119] the same time, four of said judgments having been filed on February 1, 1898, and four on February 5, 1898. The total amount of judgments so entered against the city on February 1st and 5th was about $67,000.00. The findings and conclusions in four of said causes, including said case of Bank of British Columbia, No. 1258, and the judgments therein, were signed by the Court on

January 19, 1898, but were not filed with the clerk till February 1, 1898; and the findings and conclusions in the four other cases, including said case of Manchester Savings Bank, No. 1538, were signed by the Court on January 20, 1898, and the judgments in said cases, including said case of Manchester Savings Bank, were signed by the Court on February 5, 1898, and filed with the clerk on said day, but the findings in such cases were not filed till the second day of February, 1898. Besides the said judgments so entered against the City on February 1st and 5th, 1898, there were default judgments entered against said City on similar street grade or special assessment warrants during the year 1898, amounting in all to about the sum of $30,000.00. In none of the cases described in this paragraph did the City take an appeal to the Supreme Court of the State of Washington, except in the case of Doxy v. Port Townsend, reported in 21 Washington, 707, which had gone to judgment in the lower court by default, on Dec. 27, 1898.

VIII.

Negotiations between the city and the plaintiffs in the eight cases above mentioned and described looking to a settlement of said claimed liabilities were opened. The City Council, being its legislative and governing body under its charter, held a regular meeting on February 15, 1898, that being the third Tuesday in said month, according to Ordinance No. 585, entitled "An Ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, Washington, and repealing Or-

dinance No. 470 and all other ordinances on that subject," passed by the Common Council of the City of Port Townsend, Washington, November 19, 1895, and approved by the Mayor, November 21, 1895, which said ordinance fixed the times of the regular meeting of said council on the first and third Tuesdays of each month, at the hour of eight o'clock from April to October, inclusive, and from December to March inclusive, at the hour of half-past seven o'clock. At the meeting so held on February 15, 1898, all the members of the said council and the Mayor and City Attorney (who was its law officer and adviser) were present. At said regular meeting under the head of "New Business" the clerk read notice of attorneys in street grade warrant cases. After the reading of such notices and transaction of other business the City Council took an adjournment of the meeting until three o'clock P. M. of the next day, without stating so far as the minutes of said meeting show, the object or purpose of the adjournment. The council met in pursuance of said adjournment when all the members were again present. At said adjourned meeting the said council discussed the matter of paying the street grade warrant judgments, and on that date submitted to the judgment creditors a proposition to pay their judgments against the city, in warrants for the full amount of each respective judgment, interest and costs, to be drawn on the "Indebtedness Fund" and to bear interest at six per cent (6%) instead of ten per cent (10%) per year which the judgments drew. After such discussion, the following resolution was passed

by the City Council, and it then adjourned to the next day.

"Whereas judgment has been duly entered in the Superior Court of the State of Washington, for Jefferson County, against the City of Port Townsend, in favor of the following named parties, for the following amounts respectively, to wit:

[120]

Merchants' Bank of Port Townsend	$14,375.28	
Manchester Savings Bank	7,788.71	[120]
Commercial Bank of Port Townsend	10,324.44	
John Berneson	4,587.33	
Bank of British Columbia	18,600.15	
E. M. Johnson	1,812.23	
First National Bank of Port Townsend	7,625.00	
E. Heuschober	482.65	
Alonzo Elliott	1,400.00	(about)

Together with costs and interest from date of judgments at 10% per annum.

And whereas the said parties have duly presented the said claims under said judgments against the City to the City Council, for settlement and payment;

And whereas it is the opinion of the said Council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, therefore, be it resolved by the City Council of the City of Port Townsend that said claims and

judgments be and the same are hereby allowed and ordered paid as claims against the said City and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "Indebtedness Fund" of said City, which warrants shall be signed by the City Clerk and Mayor and with the city seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same and until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named on or before February 17" at 3 o'clock P. M."

IX.

Thereupon and on the next day the judgment creditors named in the resolution and there being represented, filed the following acceptance of the City's proposition made the day before and embodied in said resolution, viz.:

Port Townsend, Wash., Feby. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

Gentlemen:

We, the undersigned judgment creditors of the said City of Port Townsend, hereby agree to accept, and do hereby accept, the proposition of the said City and its Council, made on the 16th day of February, 1898, to satisfy and pay our respective judgments

against the said City by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the "Indebtedness Fund" of said City, and to bear interest from the date of their issue at the rate of six (6) per cent per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jefferson County, Washington, upon the receipt of said warrants.

BANK OF BRITISH COLUMBIA OF VICTORIA, B. C.,
FIRST NATIONAL BANK OF PORT TOWNSEND,
E. M. JOHNSON,
EMIL HEUSCHOBER.
By MORRIS. B. SACHS,
Attorney of Record in Said Causes for Said Judgment Creditors.
THE MERCHANTS BANK OF PORT TOWNSEND,
THE COMMERCIAL BANK OF PORT TOWNEND, [121]
JOHN BARNESON.
MANCHESTER SAVINGS BANK.
By W. W. FOLGER,
Attorney of Record in said Causes for Said Last Four Named Judgment Creditors.
ALONZO ELLIOTT.
By PRESTON, CARR, GILMAN, R. W. JENNINGS,
His Attorneys.

In pursuance of said resolution and acceptance the city officers on the next day issued "Indebtedness

Fund Warrants" all bearing date February 18, 1898, numbered from 2 to 159, both inclusive.

A copy of the minutes of the City Council at said three sessions, may be introduced at the trial hereof without production of the book of minutes or of the City Clerk as a witness.

VIII.

The following is a list of all the warrants issued by the City to pay for all the judgments entered as aforesaid, based on its alleged or supposed contingent liability on special improvement warrants:

Number.	Amount.	Payee.
2	$1548.12	
3	500.00	
4	500.00	
5	500.00	
6	500.00	
7	308.15	
8	247.58	
9	487.00	
10	96.30	
11	500.00	
12	250.00	
13	250.00	
14	250.00	
15	250.00	
16	500.00	
17	500.00	
18	500.00	
19	500.00	
20	500.00	

Number.	Amount.	Payee.
21	500.00	
22	500.00	
23	500.00	
24	500.00	
25	500.00	
26	500.00	
27	250.00	
28	250.00	
29	500.00	
30	500.00	
31	500.00	
32	500.00	
33	500.00	
34	500.00	
35	500.00	
36	500.00	
37	500.00	
38	500.00	
39	500.00	
40	500.00	
41	500.00	
42	500.00	
43	500.00	[122]
44	500.00	
45	250.00	
46	125.00	
47	20.00	
48	605.00	
49	500.00	
50	440.00	
51	600.00	

Number.	Amount.	Payee.
52	600.00	
53	250.00	
54	250.00	
55	250.00	
56	250.00	
57	247.30	
58	252.70	
59	250.00	
60	250.00	
61	600.00	
62	500.00	
63	500.00	
64	120.00	
65	500.00	
66	500.00	
67	500.00	
68	500.00	
69	500.00	
70	500.00	
71	500.00	
72	500.00	
73	500.00	
74	500.00	
75	500.00	
76	500.00	
77	500.00	
78	500.00	
79	525.00	
80	25.00	
81	25.00	
82	25.00	

Number.	Amount.	Payee.
83	25.00	
84	25.00	
85	25.00	
86	25.00	
87	25.00	
88	25.00	
89	250.00	
90	500.00	
91	500.00	
92	500.00	
93	308.25	
94	691.75	
95	500.00	
96	500.00	
97	500.00	
98	500.00	
99	250.00	
100	250.00	
101	500.00	
102	500.00	
103	500.00	
104	500.00	
105	500.00	
106	500.00	
107	500.00	
108	500.00	[123]
109	500.00	
110	500.00	
111	500.00	
112	500.00	

Number.	Amount.	Payee.
113	500.00	
114	500.00	
115	500.00	
116	500.00	
117	500.00	
118	500.00	
119	500.00	
120	500.00	
121	500.00	
122	500.00	
123	500.00	
124	500.00	
125	500.00	
126	500.00	
127	500.00	
128	500.00	
129	500.00	
130	500.00	
131	500.00	
132	500.00	
133	500.00	
134	434.57	
135	525.53	
136	15.12	
137	420.00	
138	500.00	
139	471.00	
140	373.44	
141	607.30	
142	300.00	
143	500.00	

Number.	Amount.	Payee.
144	500.00	
145	500.00	
146	380.00	
147	500.00	
148	236.50	
149	300.00	
150	263.50	
151	500.00	
152	500.00	
153	500.00	
154	500.00	
155	500.00	
156	500.00	
157	500.00	
158	500.00	
159	509.30	

XI.

All of said warrants were inscribed on engraved blanks of the City of Port Townsend, signed by persons who were, on their dates, the Mayor and the City Clerk of the City of Port Townsend, marked on their face in red ink "Indebtedness Fund," and the following is the form of each warrant:

$——. Port Townsend, Wash., ——, No. ——.

By order of CITY COUNCIL ——, A. D. 18—, of the CITY OF PORT TOWNSEND, WASH, the Treasurer of said City will pay —— or order —— Dollars. For pt. satisfaction of ~~your~~ judgment, case, ~~Bank of British Columbia~~ vs. City, with interest at

six per cent [124] per annum.

"Indebtedness Fund."

D. H. HILL,
Mayor of the City of Port Townsend.
AUGUST DUDDENHAUSEN,
City Clerk.

XII.

The warrants Nos. 29, 30, 31, 32, 41, 42, 54, 55, 59, 65, 66, 89, 90, 91, 92, 93, 107, 108, 109, 111, 121, 122, 123, 124, 135, 137, 147 and 148 were all presented to the City Treasurer on February 18, 1898, and payment demanded, and he then refused payment and stamped each: "Presented February 18, 1898, not paid for want of funds" and signed "John Sichenbaum, City Treasurer," and Nos. 116–120, 128–133, 142–146, all numbers inclusive, and 149, were so presented and refusal dated "February 19, 1898"; and said warrants in this sentence enumerated were in the ordinary course of the plaintiff's business assigned and transferred to it and have ever since then been owned by it.

XIII.

Nothing has been paid on any of said warrants. Warrant No. 1 of said series was not issued for any indebtedness growing out of any street improvement and was paid before this action was begun. Warrant No. 2 was issued to Alonzo Elliott in payment of a judgment against the city on a street improvement warrant and has been paid in pursuance of a judgment of this Court in the case of David Perkins v. Charles L. Intermela, Treasurer, since this action

was begun. Nothing has been paid on any of the other warrants in said list above enumerated, nor call made. Said judgment in Perkins v. Intermela amounted with interest and costs to $3,467.63.

XIV.

Since the issue of said warrants above listed, the defendant has levied taxes for the payment of indebtedness from the Indebtedness Fund of said city in pursuance of Chapter 34 of the Session Laws of the Legislature passed at the session of 1897, as follows:

In October, 1899, 1/10 mill on the dollar upon a property assessment of $1,532,036.00.

In September, 1900, 4/10 mill on the dollar upon a property assessment of $1,161,700.00.

In October, 1901, 1 55/100 mill on the dollar upon a property assessment of $1,067,932.00.

In October, 1902, 1 55/100 mill on the dollar upon a property assessment of $855,870.00.

In October, 1903, 1 55/100 mill on the dollar upon a property assessment of $869,973.00.

In October, 1904, 1 mill on the dollar upon a property assessment of $936,314.00.

In October, 1905, 1 mill on the dollar upon a property assessment of $960,967.00.

In October, 1906, 1 50/100 mill on the dollar upon a property assessment of $1,030,480.00.

In October, 1907, 2 mills on the dollar upon a property assessment of $965,160.00. [125]

In October, 1908, 1 mill on the dollar upon a property assessment of $1,291,142.00.

No levy for the payment of indebtedness from the

Indebtedness Fund, under said statute or otherwise, has been made since the levy of 1908.

Said Chapter 84 of the Session Laws of 1897 may be treated as a matter of fact before the Court the same as if herein specifically set out.

XV.

There have been realized from delinquent taxes for 1896 and prior years, from time to time, aggregating to this time not less than $38,000.00.

The following is a list by years from 1898 to 1913 inclusive, of the assessed valuation of Port Townsend property, its levy for the Indebtedness Fund when any such levy was made, and the tax charged against the property for such levy:

Year.	Assessed Valuation.	Levy for Gen. Indebtedness.	Computed Amount Realized.
1898	$1,516,567.00	.1	$151.66
1899	1,466,910.00	.1	146.69
1900	1,161,685.00	.4	464.67
1901	1,172,071.00	1.55	1816.71
1902	855,870.00	1.55	1326.60
1903	869,973.00	1.55	1348.46
1904	936,214.00	1.0	936.21
1905	960,697.00	1.0	960.70
1906	1,030,480.00	1.5	1545.72
1907	1,181,323.00	2.0	2362.65
1908	1,290,942.00	1.0	1290.94
1909	1,292,404.00		
1910	1,317,201.00		
1911	1,364,936.00		
1912	1,365,235.00		
1913	1,391,639.00		

XVI.

The following is a list by years of the delinquent taxes collected from 1898 to 1905, inclusive, on Port Townsend property, under the tax-rolls for the years 1891 to 1897, inclusive:

Date of Roll.				1898.	1899.	1901.	1902.
Del.	Tax	roll	1891	$ 21.23	$ 136.10		$ 689.77
"	"	"	1892	45.97	250.48	$ 21.03	924.93
"	"	"	1893	124.67	691.21	170.04	2211.86
"	"	"	1894	157.70	393.27	227.99	1059.12
"	"	"	1895	597.46	745.70	654.81	685.75
"	"	"	1896	645.23	610.01	458.99	212.46
"	"	"	1897	5627.21	712.76		
				$7219.47	$3539.55	$1527.86	$5783.89
				1903.	1904.	1905.	
"	"	"	1891	$1232.84	$1860.02	$ 925.04	
"	"	"	1892	1518.16	2356.82	2439.51	
"	"	"	1893	3333.39	1974.69	902.16	
"	"	"	1894	1588.02	1027.10	1109.73	
"	"	"	1895	3286.48			
"	"	"	1896	2633.74	277.01	107.19	
				$13592.63	$7495.64	$5483.63	

[126]

XVII.

On October 4, 1898, the City Treasurer transferred on his books Five Hundred Ten Dollars Nineteen Cents ($510.19) from the Indebtedness Fund to the Sinking Fund. The Sinking Fund is the fund appropriated to the redemption of bonds of the City.

On May 18th, 1909, the City Treasurer transferred on his books Twenty-five Hundred Dollars (2500.00) from the Indebtedness Fund to the Current Expense Fund.

On Feb. 15th, 1910, the City Treasurer transferred on his books Seven Hundred Eighty-seven Dollars

Forty-one Cents ($787.41) from the Indebtedness Fund to the Current Expense Fund.

All of these transfers were made under orders by the City Council to make them, and the sums so transferred have been expended since said dates in payment of charges against the funds to which they were transferred, and no part of them was expended on any charges against the Indebtedness Fund. The sum of $527.07 now stands on the Treasurer's books to the credit of the Indebtedness Fund, and is in his hands.

XVIII.

From January, 1899, when a change in city officers occurred, the city refused to allow any more default judgments to be taken against it on any of the street grade or special assessment warrants of the kind and character hereinbefore described, of which there was still a considerable quantity and it contested all such suits.

XIX.

During 1897 and 1898 and when said judgments above mentioned were entered and the Indebtedness Fund Warrants issued in payment of them, the city was indebted beyond its constitutional limit of indebtedness, exclusive of said warrants and of any indebtedness for supplying the city with water, artificial light or sewers, and it did not own or control any works for supplying water, light or sewers and the total assets of the city including all uncollected taxes, penalties and interest due the city, money from all sources and cash on hand, were not sufficient

during the years 1897 and 1898 to bring the city within its constitutional limit of indebtedness.

XX.

The assent of three-fifths of the voters of the city, voting at any election has not been had at any time for the purpose of incurring any part of said street grade warrant indebtedness, nor any part of the Indebtedness Fund warrants issued in payment of said judgments, nor has it been otherwise authorized except as hereinabove set forth.

XXI.

Nothing stated in this stipulation is to be deemed an admission by either party of relevancy, materiality or legal effect of any fact stated herein; but the facts stated herein are such as the respective parties can agree on and desire to lay before the Court without involving an admission by the other party of the legal effect thereof.

XXII.

All figures of tax levies and corrections herein are subject to an accounting under orders of the Court before entry of final judgment, in case the decision of the Court on the merits shall be in favor of the plaintiff. [127]

XXIII.

On the first day of February, 1898, when the act of 1897 creating the Indebtedness Fund went into effect, the city had a large amount of delinquent taxes outstanding for 1891, 1892, 1893 and 1894, which the city treasurer afterwards proceeded to collect, and had also delinquent taxes for 1895 and 1896 outstand-

ing. The city collected its own taxes for 1894 and previous years, but by an act entitled "An Act to provide for the assessment and collection of taxes in municipal corporations of the third and fourth class in the State of Washington, and declaring an emergency," approved March 9, 1893, and by city ordinance No. 569, entitled "An Ordinance relating to the assessment and collection of taxes in the City of Port Townsend," approved March 20, 1895, the County Treasurer of Jefferson County was made the collector of city taxes for 1895 and subsequent years. In 1902 the County Treasurer, according to law, foreclosed the lien of the state and county taxes for 1895. The foreclosure proceedings resulted in the forfeiture of a large amount of property to the county, and the deed for the same to the county was filed with the County Auditor on January 12, 1903. At said time the delinquent taxes of the city that remained uncollected for 1895 amounted to $3,450.12. Afterwards the County Treasurer foreclosed the lien of the state, county and city taxes for 1896, which resulted in the forfeiture of property to the county and the deed to the county for said property was executed and filed with the auditor of said county on the 22d day of June, 1904; that at the time the said property was so forfeited to the county, the delinquent city taxes for 1896, that remained uncollected, amounted to $4,284.79.

XXIV.

All warrants payable out of the Indebtedness Fund according to the act of 1897 creating said fund prior to warrant No. 3 of the series drawn on the said

Indebtedness Fund have been paid and said warrant No. 3 of said series stands next in order of payment. There is only one series of warrants drawn on the Indebtedness Fund.

XXV.

On February 1, 1898, there were the following amounts of warrants outstanding and unpaid on the different funds mentioned in Section 9 of Ordinance No. 722, to wit: On the Fire & Water Fund, the sum of $891.35; on the Road Fund, the sum of $2,016.27; on the Light Fund, the sum of $6,680.25; on the General Expense Fund the sum of $31,150.70, the several sums herein given representing the face value of said warrants.

XXVI.

Besides the foregoing warrants there were outstanding certain other warrants, amounting in all, principal and interest, on the 1st day of October, 1895, to the sum of $53,300.00, $29,100 of which were exchanged for municipal bonds issued by authority of a popular election validating said $53,300 and the remainder of said warrants with interest became payable out of the Indebtedness Fund according to the act of 1897 creating said fund.

XXVII.

Nothing herein shall be taken as a waiver of any of the affirmative defenses set forth in the answer,

nor preclude the defendant from offering evidence in support thereof.

April 28, 1915.

CHARLES E. SHEPARD,
Plaintiff's Attorney.
U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defts."

Defendant introduced in evidence a certified copy of Section 9 of Ordinance No. 722 of the City of Port Townsend, as follows: [128]

CERTIFIED COPY OF SECTION 9 OF ORDINANCE NO. 722.

Sec. 9. It shall be the duty of the City Treasurer to turn into the Indebtedness Fund all moneys derived by the City from the County of Jefferson for its share of the proceeds of the sale of any county, property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt into the respective funds of the City, according to the respective levies therefor, until all the legal outstanding claims against the "Indebtedness Fund" of the city shall have paid *paid,* but the City Treasurer shall pay no indebtedness fund warrant, excepting the "general expense," "fire and water," "light" and "road" fund warrants without the special order of the city council.

State of Washington,
County of Jefferson,—ss.

I, George Anderson, City Clerk of the City of Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of Section 9 of Ordinance No. 722, entitled "An Ordinance defining the duties of the City Treasurer of the City of Port Townsend," passed by the City Council on Sep. 4, 1906, and approved by the Mayor Sep. 4, 1906, as the same appears of record in my office.

Witness my hand and the seal of said City this 28th day of April, 1916.

[Seal] GEORGE ANDERSON,
City Clerk. [129]

Whereupon plaintiff rested.

Thereupon the following testimony was introduced in behalf of defendant:

Deposition of A. R. Coleman, for Defendant.

A. R. COLEMAN, Esq., a witness for defendant, was called to the witness-stand, whereupon Mr. Shepard, attorney for plaintiff, objected to the taking of any evidence under the answer to the amended complaint, upon the ground that said answer did not state facts sufficient to constitute a defense in any of the affirmative defenses set up, and upon the ground that the judgments in the Superior Court of Jefferson County were *res adjudicata* against the City of Port Townsend, as between it and the plaintiff as to any matters pleaded in the defense in this action in the answer to the amended complaint. Thereupon, the

(Deposition of A. R. Coleman.)

Court stated he would hear the evidence and reserve his ruling and dispose of the objection in the final determination of the case.

Mr. Coleman testified as follows in behalf of defendant: I have practiced my profession as attorney at law for over forty years, and have resided in the City of Port Townsend for nearly 28 years, and was in Port Townsend in the Spring of 1898, and was there practicing ever since the summer of '87. I remember advising with the members of the City Council in the winter of 1898, with reference to the street grade warrants.

(Objection was made by plaintiff, through its attorney, Mr. Shepard, to the statement by the witness of any advice given orally to the City Council, or any of its members, as incompetent against the plaintiff, the purchaser of the warrants in the market after the official action had been taken by the City Council in issuing the warrants in satisfaction of judgment.

The Court allowed the testimony to be given, reserving his ruling.)

WITNESS (Continues.) Before the issuance of the indebtedness fund warrants in payment of judgments that had been rendered against the city for more than $60,000, I examined the record of the judgments for the purpose of advising the City Council. I cannot now recall the names of the judgment creditors but I might remember the names if I had them. I think they—I am [130] not sure about the Bank of British Columbia; it was talked about and I think

(Deposition of A. R. Coleman.)

it was one of those to which my advice applied; the First National Bank of Port Townsend was one; The Commercial Bank of Port Townsend was another; the Merchants Bank of Port Townsend, another; I do not remember the Manchester Savings Bank. The Mayor and several of the councilmen requested me to meet them at the city hall one afternoon, not at a meeting of the City Council, but as members of the City Council they wanted to consult me and requested my advice with reference to appealing the cases in which judgment had been rendered against the city, as to whether they should appeal them or pay them off. I asked for a couple of days in which to investigate, and in the meantime I examined the record and met the Mayor and members of the Council, and gave them my advice about the cases and about the probabilities of winning the cases on appeal, to the effect that I thought all the cases could be reversed, and that the city could beat all of the cases. I examined the case of German-American Bank against the City of Spokane, 17 Wash., that I knew of before, but examined it pretty thoroughly, and upon that decision I based my opinion that I gave to the Mayor and members of the Council. I told them the Supreme Court had decided a case that I thought would be decisive in their cases. I am not sure that I told them the name of the case, but that the Supreme Court had rendered a decision which I thought was decisive in their cases. The decision had been rendered in the summer of 1897, and this conference that I had with the Mayor and

(Deposition of A. R. Coleman.)

Council was early in 1898, and my advise to them referred to the judgments that had been rendered against the city on the street grade warrants and the indebtedness fund warrants had not been issued in payment of such judgments.

On cross-examination, the witness testified: I cannot fix the date positive of said conference. I did not charge my mind with the date, but it was within the time for appeal from the judgments on the street grade warrants, and the Mayor and members of the Council wished me to advise them as to whether they should [131] issue indebtedness fund warrants or appeal from the judgments. My impression is that all of the members of the council were present. If they were not all present, only one or two was absent. There were no other lawyers present. The Mayor and members of the Council spoke of the City Attorney, and stated that they had talked the matter over with him, but I do not know of anyone else with whom they talked. They stated that the City Attorney had advised them to pay the judgment, but they were not satisfied with his decision. They said they had no confidence in the City Attorney. They did not want the City Attorney to know that they were consulting with me. I do not know that I mentioned the case of the German-American Bank against Spokane, but that is the case I had in mind when I gave them my advice. I had in mind the case of the Bank of British Columbia against the City of Port Townsend. I think that is mentioned in the German-American Bank case in 17th Washington, and I think the judg-

(Deposition of A. R. Coleman.)

ment in the Bank of British Columbia case against the City of Port Townsend had been recently taken. My advice was that they had better appeal from these judgments. I gave no written opinion, but my opinion was rendered in an oral discussion as is usual between a lawyer and a client. They asked me what would be my fee and they declined to employ me on the terms I offered to take the case. I charged them for the advice I gave them, and my charge was paid.

On redirect examination, the witness testified: I never discussed the legal proposition with Mr. Plumley, the City Attorney, as the Mayor and Councilmen did not wish him to know that they were taking other advice, so, of course I did not tell him.

Deposition of George Anderson, for Defendant.

GEORGE ANDERSON, a witness called in behalf of defendant, testified as follows: My name is George Anderson. I am City Clerk of the City of Port Townsend, and have been such between 8 and 9 years, and was appointed in December, 1906. The book which is shown to me is the record of council meetings from 1895 to 1899, and, as City Clerk, I attended the meetings of the council, as [132] part of my duties is to make minutes of the proceedings, record the proceedings and keep a record of the meetings, and I have been doing that ever since I have been City Clerk. I know how long it takes a city council on the average to transact the business at a meeting.

(Deposition of George Anderson.)

(Mr. Shepard objected to the testimony as to the average length of council meetings, as being incompetent and immaterial, and the objection was sustained by the Court and exception allowed.)

By reference to the minutes in the minute-book of the council meetings, the meeting held on February 15, 1898, without the succeeding days, occupies two pages and a half, and it would be a short council meeting.

(Mr. Shepard objected to the statement that it would be a short meeting, upon the ground that it is incompetent, immaterial and irrelevant. The Court overruled the objection to which an exception was allowed to plaintiff.)

The witness was asked how the meetings then compared with the meetings of the present council, so far as length was concerned, to which objection was made by plaintiff, and the objection was sustained, and an exception allowed to defendant.

The minutes of February 15th, 16th and 17th were introduced for the inspection of the Court, and a copy substituted as is shown in exhibit "B" hereinabove referred to.

The witness Anderson proceeding, stated: As City Clerk I am aware of the existence of certain warrants outstanding against the City of Port Townsend, known as indebtedness fund warrants. The city has done nothing as regards providing for the payment of these warrants, and nothing has been done except when suits have been commenced. Ac-

(Deposition of George Anderson.)

tion has been taken sustaining the City Attorney, but nothing has been done regarding the payment of these warrants. It is my business to prepare statements to the city of its outstanding liabilities for bond issues and other purposes, and there was a statement made for the purpose of refunding bonds about 3 years ago. In making the tax levies, the City Council of the City of Port Townsend did not take into consideration these indebtedness fund warrants. [133]

(To such statement, plaintiff objected, and moved that the answer be stricken, but the answer was allowed to stand, and an exception allowed to plaintiff.)

Deposition of August Duddenhausen, for Defendant.

AUGUST DUDDENHAUSEN, a witness in behalf of defendant, testified as follows: My name is August Duddenhausen, I was City Clerk of the City of Port Townsend in February, 1898, having taken office in the fall of 1896 in September, to serve an unexpired term, and was elected in January as City Clerk. The minutes of February 15, 1898, are in my handwriting. The minutes for February 15th constituting 2½ to 3 pages, not quite 2½ pages. I cannot particularly recollect whether that meeting was a long or a short one, but I remember we had 3 or 4 meetings rapidly following, because there were several lawyers in Port Townsend at that time, one from Fairhaven and one from Seattle representing the Victoria Bank, and others, and the City Council and Mayor tried to get the best conditions

(Deposition of August Duddenhausen.)

from the attorneys and for that reason meetings were adjourned. They were not ready to take final action; that is about it.

Q. How many pages did the minutes of February 15, 1898, occupy?

A. Not quite two and one-half pages.

Q. Judging from the minutes and your recollection was that a long or a short meeting?

(Mr. Shepard objected to the question as immaterial. Objection overruled. Exception allowed.)

A. Judging from the minutes and my recollection it was rather a short meeting, probably lasting an hour and a half. Our meetings at that time were about two hours and a half, if I recollect rightly. It was a little shorter than usual. I say that judging from the minutes and from my recollection. I know it was put off. I think I remember at least that the meetings were adjourned because the council were not ready to act. that is about it. I heard most of Mr. Coleman's testimony in regard to the meeting he had with the members of the council. I was City clerk at the time referred to. I was told in the morning of that day that the members of the City Council and the Mayor would come to my office, but because my room was small and became crowded we went into the City Treasurer's office which was [134] larger, and when they went out to go across the hall I asked whether I should go along. It was not a regular council meeting, and one member of the council said, "Why certainly come along, but

you need not take any minutes." There were five or six councilmen present, the membership of the council being seven. The Mayor, Dan Hill, was there, and Tom Tanner, Frank Hastings and I think Frank Plummer and Mr. Oliver; that is all I recollect, but I am pretty certain they were nearly all there. I was there when Mr. Coleman gave them his advice.

(Mr. Shepard objected to any statement as to what occurred, because a private meeting of that kind is entirely immaterial to the issues. Objection overruled. Exception allowed.)

In going across the hall to the City Treasurer's office I met the City Attorney.

Q. Did he say anything?

(Mr. Shepard objected to it because private conversation between the City Clerk and the City Attorney was not admissible, to which objection the Court answered, "I will let it go in the record. I don't see now the materiality of it" Objection overruled. Exception allowed.)

A. I remember now when we crossed the hall the City Attorney, Mr. Plumley, after three or four councilmen had gone in and just as I was going in, stopped me and asked if it was an official council meeting and I answered I understood it was not, to which he said, "If it is not I won't be present," and I said "I don't know but I was told it would not be. I am not to take any minutes." So I went into the room and the Mayor laughed about Mr. Plumley stopping me and said they did not want Mr. Plumley

(Deposition of August Duddenhausen.)

there; that they had no confidence in him and that is the reason they engaged Mr. Coleman.

(Mr. Shepard moved to strike out the statement as to what the Mayor said.

The COURT.—Let it stand in the record.

To which Mr. Shepard excepted and the exception was granted.)

On cross-examination, the witness testified, upon interrogation by Mr. Shepard, as follows: I will be 75 years of age the 15th of next June. I have known Mr. Coleman ever since I came to Port Townsend, having met him the week after I arrived in November, [135] 1888. In 1898, Mr. Coleman was the leading lawyer of Port Townsend, and a leading citizen there. I kept the minutes of the council meetings during all the term of my office, and they are written in the minute-book in my handwriting. The length of the minutes has some relation to the length of the meeting, but not always, because sometimes the matter discussed might not take five minutes, and it might take a much longer time to write it out. When there was a debate over a motion, I did not put down the debate in the minutes, but simply that the motion or resolution was made and whether it was carried or not, but the council meetings of Port Townsend at that time were well guarded schemes. The pages in the minutes would very nearly indicate the length of the meeting, unless there was something particular in the contents that would explain why the pages, number and time would not agree. I cannot judge from

(Deposition of August Duddenhausen.)

the length of the minutes, at any one meeting, absolutely whether it was a long or a short meeting, but the contents of the minutes would have much to do with it.

Deposition of J. J. Bishop, for Defendant.

J. J. BISHOP, witness called in behalf of the defendant, testified, upon interrogat*o*rion by Mr. Gnagey, as follows: I am County Clerk of Jefferson County, and have been since January 9, 1916, and as such have charge of the records of that office. The book shown me is a court minute-book, which was turned over to me as County Clerk. I find a reference therein to the case of the Bank of British Columbia against the City of Port Townsend, and the Manchester Savings Bank against the City. On page 4 is a record of the case of the Bank of British Columbia against the City of Port Townsend, No. 1258; 1259, Johnson v. City of Port Townsend; 1260, First National Bank v. City of Port Townsend; 1261 Emil Heuschober v. City of Port Townsend, (afterwards changed to Shuber); 1536, Merchants Bank v. City of Port Townsend; 1537, Commericial Bank v. City of Port Townsend; 1538, The Manchester Savings Bank v. City of Port Townsend; 1539, John Barnison, as receiver, v. City of Port Townsend; all occurring on the date line of Saturday December 8, 1897. The record does [136] not show whether it was in the forenoon or afternoon.

(This record of the work transacted on the 8th

(Deposition of J. J. Bishop.)

day of December, 1897, as shown by the minute-book, was offered in evidence, to which objection was made as immaterial, and upon the ground that the proceedings were merged in the judgments, which objection was overruled by the Court and an exception allowed to plaintiff.)

On cross-examination by Mr. Shepard, the witness testified: I haven't any of the files of those cases with me.

Being recalled by plaintiff and interrogated by Mr. Gnagey, the witness testified: These are the files pertaining to my office as County Clerk.

(And the paper beginning "In the case of the Bank of British Columbia against the City of Port Townsend," was introduced in evidence, the Court reserving his ruling thereon, and marked "Defendant's Exhibit 1," and attached to this bill of exceptions.)

The amended answer and the reply in the case of Manchester Savings Bank vs. City of Port Townsend were introduced in evidence, the Court reserving his ruling on objection by plaintiff in cause No. 1558, and marked "Defendant's Exhibit 2."

Deposition of U. D. Gnagey, for Defendant.

U. D. GNAGEY, called as a witness in behalf of defendant, upon interrogation by Mr. Stedman, testified as follows: I am chief counsel for the defendant in this case, and City Attorney of Port Townsend, and have just started on my seventh term as City Attorney of one year each. I was a practicing at-

(Deposition of U. D. Gnagey.)

torney and also doing stenographic work and typewriting in the fall of 1897 and winter of 1898. I did some stenographic work in drawing the findings in these warrant cases. At that time, the case of German-American Savings Bank vs. City of Spokane, reported in 17 Wash. pg. 315, and decided on June 6, 1897, was generally known and discussed at least among some of the lawyers of Port Townsend. One of them was Mr. Telger, who was counsel or one of the attorneys for the Manchester Savings Bank, and I am sure it was known also to Mr. Plumley, the City Attorney, as my recollection is that I talked with Mr. Plumley and Mr. Telger just as attorneys, but in no official capacity, about the case. I would not say it was discussed before the City Council at that time.

On cross-examination by Mr. Shepard, the witness testified: [137] I came to Port Townsend about the 4th of August, 1889, and was admitted to practice in the summer of 1892, but I did not engage in practice at once. I was in practice in 1897 and 1898, and also did some court reporting, and did some work on these cases in typewriting. I was not connected with the cases in any way as attorney. I have been City Attorney for several years, and have been deeply interested in contesting these cases.

Whereupon defendant rested, and the following occurred on plaintiff's rebuttal:

Mr. Shepard requested counsel for the City to admit that the case of the Bank of British Columbia vs. Spokane, in which judgment was taken on or

(Deposition of U. D. Gnagey.)

about the first day of February, 1898, was the same case that went to the Supreme Court, at a previous hearing of said cause, and was reported in Vol. 16 Wash. pg. 460, and Mr. Gnagey, in behalf of the City, admitted the facts but objected to the materiality and relevancy thereof under the peadings. The Court reserved its ruling. Upon objection by Mr. Stedman that defendant did not wish to be in the position of denying what was known to be a fact, he objected to the relevancy inasmuch as there was no mention in the pleadings of such fact. Whereupon, Mr. Shepard, counsel for plaintiff, requested permission to set the matter up in reply, and, upon objection by Mr. Stedman, upon the ground that the reply should not be amended after waiting 2½ years, the Court allowed the amendment to be made, and gave the defendant an exception. Whereupon, Mr. Shepard stated that he would prepare a formal reply, pleading that fact as *res adjudicata* and as establishing the law of the case. Whereupon the plaintiff rested.

Deposition of George Anderson, for Defendant (Recalled).

GEORGE ANDERSON, whose deposition was taken upon stipulation of the parties, called in behalf of the defendant, testified as follows. (Recalled): I am the City Clerk of the City of Port Townsend; the book, which I now produce, and marked "Ledger B" is the ledger kept in the City Clerk's office, and is a record [138] of all the

(Deposition of George Anderson.)

transactions of the city beginning January 1, 1884. It contains the records of warrants issued from time to time on various funds of the city and shows by the figures and footings the amounts outstanding against those funds from time to time, after deducting warrants paid and cancelled. By the entries on page 35 shows that the amounts outstanding on Jan. 1, 1897, against the Fire and Water Fund was $7,776.34, and on Jan. 1, 1898, outstanding against the same Fund $9,239.35; on Feb. 1 1898, $8,659.35. On Jan. 1, 1897, against the Road Fund there stood $876.65, and on the Light Fund, $7,880.69, and on the General Expense Fund, $33,321.69 and on Jan. 1, 1898, there were the following amounts against the same fund,—On the Road Fund there was $2,245.91. On the Light Fund the sum of $6,826.65 On the General Expense Fund, $31,442.87. On Feb. 1, 1898, there were against these same Funds the following amounts:—On the Road Fund, $1,926.27. On the Light Fund, $6,530.66. On the General Expense Fund, $31,421.35. These amounts did not differ greatly from January 1, 1897, to March 1, 1898. I have the Treasurer's register of warrants and the warrant books, which show the total amount of the street grade warrants. From Jan. 1, 1888, to Jan. 1, 1893, there were issued $98,981.50. Prior to Jan. 1, 1898, there were paid $26,073.01, leaving outstanding from Jan. 1, 1893, $72,908.40. These street grade warrants were issued during the years 1888, 1889, 1890, 1891 and 1892, and the figures I have given represented the face of the warrants without the addi-

(Deposition of George Anderson.)

tion of any interest. These warrants, with interest added up to Feb. 1, 1898, amounted approximately to $130,000. I have the books in the Treasurer's office showing the amount of bonds outstanding during the years 1897 and 1898. The first issue was in 1891, of $85,000, and in 1895, of $29.100. The assessed valuation of the City of Port Townsend for 1897, was $1,341,426. The total indebtedness of the city on all funds, including the bonds during the years 1897 and 1898, as shown by the records, was over $200,000.

On cross-examination by Mr. Shepard, the witness testified: **[139]** I mean that there was only a small amount over $200,000 of the total indebtedness. The bond issues were authorized by popular vote of the city. The assets of the city, by way of uncollected taxes on real estate and on real estate bid in for taxes and other assets of the city, were for delinquent taxes for 1891, 1892, 1893 and 1894, and were $49,373.36, and the other assets in 1897 and 1898 were cash on hand, $4,350.96 on Jan. 1, 1897; on Jan. 1, 1898, $7,703.70. The cash ran about the same during the year. The value of the city hall on that date was approximately $40,000. Since 1898, the City of Port Townsend has not increased its current expense indebtedness, and it has reduced its debt slightly,—about $40,000, in warrants, exclusive of interest, and the city has paid its general expense and current expense warrants, Fire and Water and Road and Light Warrants, except a small amount of those warrants still outstanding. Those warrants have been paid from current expense and delinquent taxes and pro-

(Deposition of George Anderson.)

ceeds of the sale of county property. It has not paid anything on the indebtedness warrants, except Warrant #2 issued in payment of judgment, and Warrants Nos. 1 and 160, both small, which were not for judgments. The State Examining Board has lately made an appraisement of the city's assets. I have their appraisement officially signed and returned by them (which said appraisement was offered in evidence by the plaintiff, giving the assets and liabilities of the city as of December 18, 1911, which is as follows):

Mr. Gnagey objected to the introduction of that part of said appraisement and to each and every item thereof referring to

"Real Estate and Fixtures, City Hall, pg. 63 ..... $61,400.00
"Fire Department, pg. 62..... 8,819.00
"Police Department, pg. 62..... 316.00
"Engineer's Department (pg. 62)..... 149.00
Street Department, pg. 63..... 1,191.00

on the ground that the said items are and each and every one thereof is irrelevant and immaterial.

(Objection overruled and exception allowed.)

"ASSETS AND LIABILITIES OF CITY.

ASSETS.

Real Estate and Fixtures, City Hall, pg. 63 ..... $61,400.00
Fire Department, pg. 62..... 8,819.00
Police Department, pg. 62..... 316.00
Engineer's Department (page 62)..... 149.00

(Deposition of George Anderson.)

Street Department (page 63)	1,191.00
Uncollected Taxes	3,687.95
Cash Current Expense Fund	1,971.09
Cash Indebtedness Fund	309.96
Cash Interest Fund—1st issue	1,378.56
Cash Interest Fund—2d issue	815.98
Cash Public Library Fund	52.22
	$80,091.36

[140]

LIABILITIES.

Municipal Bonds (page 60)	$104,100.00
Current Expense Warrants (page 47)	8,085.39
Public Library (page 48)	7.75
Municipal Bond Red. (Def.)	158.22
Indebtedness Fund Wts. Legality of which is now being questioned (page 54)	96,221,88
Indebtedness Wts. not questioned (page 48)	135.15
Examiner's Findings (page 22) $208,787.37)	78.98
	$208,787.37
Excess of Liabilities over Assets	128,696.01
Declared illegal by Washington Supreme Court	96,221.88
Net Excess of Liabilities over Assets	32,474.13

The summary includes some assets the city did not own in 1898. I have lived in Port Townsend for 24

(Deposition of George Anderson.)

years, and have been City Clerk for over 8 years. The city hall was built in 1891 or 1892. In 1898, it owned its hall and lot, and also a building and lot on Washington Street, which are valued in the appraisement at $37,000. The other assets listed under the head of "Real Estate and Fixtures" have been acquired since then. The city had a fire department in 1898, but had no public library.

On re-examination by Mr. Gnagey, in the absence of Mr. Shepard, the witness stated: When I stated in my cross-examination that the delinquent taxes for the city for 1891, 1892, 1893 and 1894 were $49,373.36, I meant that they amounted to that sum on Jan. 1, 1897. There were small sums collected during the year 1897, but they did not materially reduce the amount. I do not know of any delinquent taxes for any year prior to 1891.

Deposition of J. D. Lidders, for Defendant.

J. D. LIDDERS, being called and sworn, on examination by Mr. Gnagey, attorney for defendant, testified as follows: I am County Auditor of Jefferson County, Washington, and have been since the second Monday in January, 1915. I have in my office a record showing the delinquent taxes for the City of Port Townsend for the years 1895, 1896 and 1897, which is an official record in the auditor's office. The delinquent taxes for the City of Port Townsend for the year 1895, on Jan. 1, 1897, were $8,569.85, and for the year 1896, the whole amount to be collected on Jan. 1, 1897, was $13,529.45. On

(Deposition of J. D. Lidders.)

Jan. 1, 1898, the delinquent taxes [141] for the city for 1895 were $6,296.96, and for the year 1896, $6,697.66, and the taxes for 1897 to be collected amount to $11,251.54, which were not yet payable. Small portions of the delinquent taxes were collected during the different years and up to the time they were forfeited or cancelled by forfeiture of the property to the county in January, 1903, and the years following. The records of the auditor's office do not show any delinquent taxes of the city for any year prior to the year 1895.

A certified copy of the amended answer and the reply of the City of Port Townsend, in the case of Manchester Savings Bank, a Corporation, vs. City of Port Townsend, is as follows:

"*In the Superior Court of the State of Washington for Jefferson County.*

THE MANCHESTER SAVINGS BANK, a Corporation,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a Municipal Corporation,

Defendant.

Amended Answer.

The defendant in the above-entitled action for its Amended Answer to plaintiff's complaint, alleges:

I.

Defendant admits that the plaintiff is a corporation, as in the complaint alleged.

II.

Defendant admits that at the time of the commencement of this action, this defendant was a municipal corporation created and organized under the acts of the Legislative Assembly of the Territory of Washington, in said complaint alleged; but this defendant avers that subsequent to the commencement of this action, pursuant to the laws of the State of Washington governing the reorganization of cities, this defendant was duly reorganized as a City of the Third Class, and since has been and now is a municipal corporation duly organized, created and existing under the general laws of the State of Washington.

III.

Defendant admits the allegations of paragraphs three, four, five, six, seven, eight, nine, ten and eleven, in said plaintiff's complaint contained.

IV.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations in the twelfth paragraph in said complaint contained, and therefore denies each and every part and portion thereof.

V.

Defendant denies the allegations in paragraph thirteen [142] in the said complaint contained.

VI.

Defendant answering the allegations in paragraph fourteen in the complaint, alleges: That under and by virtue of ordinances No. 160 and 212 in plaintiff's complaint set forth, this defendant did establish a special assessment district consisting of the

property fronting upon the proposed improvements and established boundaries thereof embracing the property abutting upon the improved portion of Washington Street from Taylor to Harrison Streets, and filed a plat thereof, and of the real estate subject to the assessment therefor, and duly made and levied and assessed the amount and value of said improvements against the said real estate improved and abutting upon the said improvement, and duly equalized the same, and caused the same to be extended upon the assessment-rolls, and caused to be prepared duplicate assessment-rolls, and placed the same in the hands of the proper officers for the collection and enforcement of said assessments, and the said defendant done and performed all matters and things in full compliance with the provisions of the said ordinances, for the assessing of the costs of the said improvements upon the property embraced within the said improvement district. That the proper officers of this defendant proceeded immediately to the collection of the said assessments so made, and did collect a large amount of the said assessments, and since the said time of the making of the said levy and assessments, this defendant, by its proper officers, has been and now is collecting the assessments and providing a fund for the payment of the warrants in the said complaint described. Defendant specifically denies that this defendant at any time failed, neglected or refused, or does fail, neglect or refuse, to comply with any of the provisions of the said ordinances, or to take any steps or make any provision for the payment of the

said indebtedness, or to comply with the terms and agreements of the contract in the same complaint alleged.

VII.

Defendant alleges, that the certain warrants drawn and issued to W. C. Williams for the various sums and amounts as in paragraph ten in plaintiff's complaint alleged, were payable to the said W. C. Williams from the certain fund known as the Washington Street Improvement Fund, the provision for the providing of which fund are alleged in paragraph six of this Answer, and the said warrants were not and are not payable in any other manner than from the Washington Street Improvement Fund, and the said warrants so payable as aforesaid, were taken and accepted in full payment of the various sums and amounts found to be due him under his said contract, and the said warrants were not and are not a charge against this defendant, other than the liquidation of the same from the Washington Street Improvement Fund upon which the same are drawn.

VIII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph fifteen in plaintiff's complaint, therefore defendant denies the same and each and every part thereof.

IX.

That defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph sixteen in plaintiff's complaint

contained, therefore denies the same and each and every part and portion thereof.

X.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations in the seventeenth paragraph in the plaintiff's complaint contained, therefore denies the same. [143]

XI.

This defendant specifically denies that by reason of the negligence of this defendant for failure to make the assessment and collection of the same, for the improvement of the property abutting upon the street so improved, and by reason of the failure of this defendant to carry out the provisions of the contract in providing a fund for the payment of the said warrants, and by reason of any of the allegations in the plaintiff's complaint alleged, or otherwise, the plaintiff has been damaged in the sums and amounts in paragraph eighteen in said complaint alleged, or in any other sums or amounts whatsoever.

XII.

Defendant admits paragraph nineteen in said complaint contained.

XIII.

Defendant admits that on the 26th day of March, 1895, plaintiff presented its claims to this defendant for allowance, and that the same was not allowed except as a charge against the Washington Street Improvement Fund, and defendant denies that the said claims or any part thereof is due and owing said plaintiff from this defendant.

WHEREFORE defendant prays judgment of this Court that this action be dismissed, and for its costs and disbursements herein.

S. A. PLUMLEY,
Attorney for Defendant.

State of Washington,
County of Jefferson,—ss.

D. H. Hill, being first duly sworn, on oath says: That he is the Mayor of the City of Port Townsend, the defendant in the above-entitled action; that he has heard the foregoing Amended Answer read, knows the contents thereof, and believes the same to be true.

D. H. HILL.

Subscribed and sworn to before me this 4th day of January, 1897.

[Seal] J. N. LAUBACH,
City Clerk of the City of Port Townsend, Washington.

In the Superior Court of the State of Washington for the County of Jefferson.

THE MANCHESTER SAVINGS BANK,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a Municipal Corporation,
Defendant.

Reply to Amended Answer.

Comes now the plaintiff herein and replies to the amended answer of the defendant herein as follows:

1. Plaintiff replying to the sixth paragraph of said answer admits "That under and by virtue of ordinance No. 160 and 212 in plaintiff's complaint set forth, this defendant did establish a special assessment district consisting of the property fronting upon the proposed improvements and established boundaries thereof embracing the property abutting upon the improved portion of Washington Street from Taylor to Harrison Streets"; but plaintiff denies each and every other allegation contained in said paragraph six of said answer.

2. Replying to the seventh paragraph of said answer plaintiff denies each and every allegation in said paragraph contained except that the said warrants on their face were drawn in favor of one W. C. Williams upon the certain fund known as the Washington Street Improvement Fund.

Wherefore plaintiff prays judgment as in its complaint.

W. W. FELGER and
STRUVE, ALLEN,
HUGHES & McMICKEN,
Attys. for Plaintiff.

State of Washington,
County of Jefferson,—ss.

W. W. Felger, being first duly sworn, on oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, that he makes this verification for and in behalf of said plaintiff for the reason that said plaintiff is not within the State of Washington; that he has read the foregoing reply to the amended answer of the de-

fendant herein, knows the contents thereof and believes the same to be true.

W. W. FELGER.

Subscribed and sworn to before me this 15th day of January, 1897.

U. D. GNAGEY,
Notary Public.

Copy of the foregoing reply received and service accepted Feb. 17, 1897.

S. A. PLUMLEY,
City Attorney.

[Endorsed]: Defendant's Ex. 2. Filed Feb. 18, 1897. J. N. Laubach, Clerk.

Exhibit "B."

"Port Townsend, Wash., Feby. 15/98.

The City Council of the City of Port Townsend met in regular session today at 7:30 P. M. at the Council Chamber. At the call of the roll there were present the Mayor, the City Clerk, the City Atty., the City Marshal and all the seven Councilmen.

The minutes of the preceding regular meeting were read and approved under call of

COMMUNICATIONS AND REPORTS

a letter was read of Robt. C. Hill, reg. tax and the Townsend Gas & Electr. Co. reg. prices for electric light and laid aside to await call for unfinished business. [144]

Under call of

REPORTS OF STANDING COMMITTEES

the Clerk then read the approved reports of the City

Marshal and of the Judicial Officer, both for the month of January, 1898, which on motion were accepted and ordered filed.

Councilman Hastings made verbal report for Committee on Fire, Water & Light, reg.: Fire alarm box asked by Supervising Surgeon of Marine Hospital —stating that Surgeon did not like to apply to the U. S. Treasy. Department for authority to pay for such box. Some discussion follows, after which on motion of Councilman Kuehn, seconded by Councilman Hastings, the Committee of F. W. & L. was instructed to buy an auxiliary box and have it placed on the porch in front of the Hospital.

Under call of

INTRODUCTION AND CONSIDERATION OF ORDINANCES

the clerk read a letter of Super. of the Western Union Telegr. Co. at San Francisco reg.: substitution of the word "public" for the word "police" in Section 3 of the respective ordinances lately passed, and stated that he had answered the letter. The statement by members of the Judiciary Committee and the City Attorney followed to the effect that this substitution had *not* been made inadvertently but with intent.

Under call of

CLAIMS AGAINST THE CITY

the following approved requisitions and bills were read, viz.: of L. R. Martin for hay, kerosene, etc., and of Committee on Streets and Sidewalks for 250 blank notices, and of Fin. Committee for 50 blanks

for Treasurer's office, which were allowed, as also of S. A. Plumley, City Atty., for fees under contracts of Nov. 3/96 & of Feby. 16/97, for $300 of P. M. Coyne for horseshoeing for $4.50, of F. A. Willoughby for Marsh. office for $4, which were ordered paid out of the current expense fund, and of Starrett Estate Co. for lumber furnished in Jany. '98, for $35.95, which was ordered paid out of the Indebtedness Fd.

Under call of

APPLICATION FOR LICENSES

the Clerk read the application for wholesale liquor license of Thomas J. Tanner which was referred to Committee on Police, Rev. & License.

Under call of

UNFINISHED BUSINESS

the petition of R. C. Hill was called up and was on motion granted—after some discussion and after statement of the petitioner who was present. It appeared that, by a clerical error taxes had been marked paid for the '93 and '94 on Lot 3 Block 53, while it should have been on Lot 5 of the same block. The correction—as was stated by Councilman Peterson—already has been made by the County Commissioners. The City Treasurer was authorized to make the necessary correction of the resp. tax rolls.

The letter—or proposal—of John Lillie, Manager of the Townsend Gas & Electric Co., was then read. He offers to furnish electric light for the City at figures as follows, viz.: as many street lights as the Council may order from Feb. 15/98, until a new con-

tract is entered into, for each 2000 C. p. light on Morgan Hill, First Str., Plummer Str., $15 p. m., for all such other light $14 p. m. The bid of said Company for furnishing such light under a new contract was the only bid received and was then opened and read. On motion of Councilman Tanner, seconded by Councilman Kuehn, the matter was referred to the Committee on F. W. & L. to report at next regular meeting of the Council. [145]

The written offer of the Plummer Estate Co. was hereafter read reg.: sale to the City of lot 6 block 44, Or. Towns., together with the building thereon, all taxes including those of 1897, to be paid up, for the sum of $400. This matter, on motion of Councilman Tanner, seconded by Councilman Torjuson, was then referred to the Committee on Publ. Bldgs.

The old claim of F. Terry for feeding city horses having been brought up by Councilman Tanner, it was—on motion of Councilman Turjuson, after some discussion, ordered to pay him $6 by warrant on Current Expense Fund.

Under call of

NEW BUSINESS

the Clerk read notice of Atty's in Street Grade Warrant cases and the City Atty. stated that notice had been served on the City by the U. S. Marshal in the case of condemnation proceedings of the greater part of the Juan de Fuca Addition, in reg. to which—on motion of Councilman Hastings, seconded by Councilman Tanner—it was decided to let the case go by default. On motion of Councilman Oliver, seconded by Councilman Tanner, the Treas-

urer was instructed to certify to the U. S. Court the amount of taxes on said property.

After which, on motion the council took a recess until 3 o'clock P. M., Feby. 16, 1898."

It was also stipulated as evidence in the cause, between the counsel of the parties, that the case in the supreme court entitled The Bank of British Columbia of Victoria vs. The City of Port Townsend, No. 2024, reported in Vol. 16 of Washington Reports, at pp. 450–459, was an appeal from a judgment of dismissal of the action brought in the superior court of Washington,, which action, after the reversal by the supreme court of said appeal, resulted in the judgment of the superior court for Jefferson County in favor of the plaintiff therein against the City, which was one of the judgments paid by the warrants issued under the order of the City Council on February 17, 1898, and some of which warrants are in suit in this action; and that at the same time appeals were taken to the supreme court from judgments of dismissal by the superior court in Jefferson County in three other cases, entitled E. M. Johnson vs. The City of Port Townsend, No. 2021, E. Heuschober vs. The City of Port Townsend, No. 2022, and First National Bank vs. Port Townsend, No. 2023, and which cases are reported in Vol. 16 of Washington Reports at pages 701, 702, and the said three cases are the identical cases which resulted in judgments of the superior court under the said titles against the City, and which judgments are listed in the list of judgments which were paid under the order of the City Council, made on Feb-

ruary 17, 1898, by Indebtedness Fund warrants, some of which are in suit herein; and that all four of said judgments are identified by the contents of the Indebtedness Fund warrants issued for them. All four of said appeals were taken, argued and decided at the same time, as shown by the said Washington Reports and not otherwise. [146]

And now in due time defendant submits the foregoing as its proposed bill of exceptions herein, and prays that the same may be settled and allowed.

Dated this 28th day of February, A. D. 1916.

U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

The foregoing bill of exceptions is presented in due time and is true and correct, and same may be settled and filed.

May 24, 1916.

CHAS. E. SHEPARD,
Attorney for Plaintiff.

Order Settling, etc., Bill of Exceptions.

And now on this 24th day of May, A. D. 1916, this cause coming on to be heard upon the application of the defendant to have its bill of exceptions settled, signed and filed and made of record in said cause, and the plaintiff appearing by its attorney, Charles E. Shepard, Esq., and the defendant appearing by its attorneys, U. D. Gnagey and Hastings & Stedman, of counsel, and it appearing to the Court that the foregoing bill of exceptions contains all the facts upon which said cause was tried before the undersigned presiding judge upon the trial of said cause,

and all the evidence and testimony offered or received upon the trial of said cause, and all objections made by counsel for the respective parties to the receiving or rejection of said evidence and all the rulings of the Court thereon, and all exceptions taken at the time thereto, said bill of exceptions is hereby settled, signed and ordered filed, and made of record herein—all of which is accordingly done by the undersigned, the judge before whom said cause was tried.

JEREMIAH NETERER,

Judge of the United States District Court for the Western District of Washington, Northern Division. [147]

Service of the within draft of proposed bill of exceptions by delivery of copy thereof to the undersigned is hereby acknowledged this 28th day of February, A. D. 1916.

CHARLES E. SHEPARD,

Attorney for Plaintiff. [148]

Exhibit 1.

Saturday, December 18, 1897.

No. 1258.

BANK OF BRITISH COLUMBIA

vs.

CITY OF PORT TOWNSEND.

) Ordinance Book of the City of Port Townsend.

Exhibit "A" Plft. Proof filed) Ordinance No. 274, Page 102. Defendant object Overruled & Exception allowed.

Exhibit "B" Plft. Proof filed) Ordinance 279 Page 103 of Ordinance Book.

Exhibit "C" Plft. Proof filed Ordinance 257 Page 100 of Ordinance Book.

Exhibit "D" Plft. Proof filed Ordinance 117 Page 87 of Ordinance Book.

Exhibit "E" Plft. Proof filed Ordinance 160 Page 89 of Ordinance Book.

Exhibit Original contract of City with Terry & McDougall.

Exhibit "F" Plft. Proof filed On Adams, Quincy and Monroe Streets.

Exhibit "G" Plft. Proof filed Original contract between City & W. C. Williams.

Exhibit "H" Plft. Proof filed Original contract between City & Chas. O'Brien.

Exhibit "I" Plft. Proof filed Warrant No. 81.

Exhibit "J" Plft. Proof filed Warrant No. 83.

Exhibit "K" Plft. Proof filed Warrant No. 84.

Exhibit "L" Plft. Proof filed Warrant No. 85.

Exhibit "M" Plft. Proof filed Warrant No. 97.

Exhibit "N" Plft. Proof filed Warrant No. 98.

Exhibit "O" Plft. Proof filed Warrant No. 99.

Exhibit "P" Plft. Proof filed Original Assessment Rolls of Monroe St. ft. Wash & Water Sts.

Exhibit "Q" Plft. Proof filed Original Assessment Rolls of Adams St. ft. Wash & Water Sts.

Exhibit "R" Plft. Proof filed Original Assessment Rolls of Jefferson St. ft. Jackson & Walker.

No. 1259.

JOHNSON

vs.

CITY OF PORT TOWNSEND.

Exhibit "A" Plft. Proof Ordinance No. 117 Page 87
" "B" " " " " 160 " 89
" "C" " " " " 235 " 97
" "D" " " " " 279 " 103
" "E" " " " " 203 " 94
" "F" " " Warrant " 66
" "G" " " " " 74
" "H" " " " " 73
" "I" " " Original Contract between City and W. C. Williams, Washington Street Fill
" "J" " " Original Contract between City & Terry & McDougall, Monroe St. from Water to Washington.
" "K" " " Original Contract between City & Terry & McDougall, Adams St. Water to Wash.
" "L" " " Ordinance No. 117 Page 87
" "M" " " " " 160 " 89

[149]

Saturday, December 18, 1897.

No. 1260.

FIRST NATIONAL BANK

vs.

CITY OF PORT TOWNSEND.

Exhibits "A" Plft. Proof Ordinance No. 216 Page 95
" "B" " " " " 249 " 99
" "C" " " " " 216 " 95
" "D" " " " " 203 " 94
" "E" " " " " 216 " 99
" "F" " " " " 284 " 103
" "G" " " " " 249 " 99
" "H" " " " " 278 " 102
" "I" " " " " 263 " 102

"	"J"	"	"	"	"	278	" 102
"	"K"	"	"	"	"	117	" 87
"	"L"	"	"	"	"	160	" 89
"	"M"	"	"	Warrant	"	14	
"	"N"	"	"	"	"	32	
"	"O"	"	"	"	"	26	
"	"P"	"	"	"	"	34	
"	"Q"	"	"	"	"	75	
"	"R"	"	"	"	"	50	
"	"S"	"	"	"	"	85	
"	"T"	"	"	"	"	115	
"	"U"	"	"	"	"	2	
"	"V"	"	"	"	"	25	
"	"W"	"	"	"	"	170	
"	"X"	"	"	"	"	124	
"	"Y"	"	"	"	"	167	
"	"Z"	"	"	"	"	174	
"	"A–1"	"	"	Original Contract by City & W. C. Williams, Washington St.			
"	"B–1"	"	"	Original Contract by City & L. H. Cays, Tyler St. Sidewalk			
"	"C–1"	"	"	Original Contract by City & L. H. Cays, Fillmore St. Sidewalk			
"	"D–1"	"	"	Original Contract by City & W. C. Williams, Calhoun & Minor St. Sidewalk			
"	"E–1"	"	"	Original Contract by City & Terry & McDougall, Quincy St. Improvement			
"	"F–1"	"	"	Original Contract by City & Chas. G. Warren, Jefferson St. Sidewalk			
"	"G–1"	"	"	Original Contract by City & Saul Shoply, Polk St. Sidewalk			
"	"H–1"	"	"	Original Contract by City & L. H. Cays, Lawrence St. Sidewalk			
"	"I–1"	"	"	Original Contract by City & Saul Shoply, Madison St. Improvement			
"	"J–1"	"	"	Original Contract by City & Chas. G. Warren, Washington St. Sidewalk			
"	"K–1"	"	"	Original Contract by City & Chas. O'Brien, Taylor St. Improvement			
"	"L–1"	"	"	Original Contract by City & Saul Shoply, Taylor. St. Improvement			
"	"M–1"	"	"	Original and duplicate assessment-rolls, Washington St. Improvement			

"	"N–1"	"	"	Original and duplicate assessment-rolls, Tyler St. Sidewalk
"	"O–1"	"	"	Original and duplicate assessment-rolls, Fillmore St. Sidewalk
"	"P–1"	"	"	Original and duplicate assessment-rolls, Calhoun and Minor St.
"	"Q–1"	"	"	Original and duplicate assessment-rolls, Quincy St. Improvement

[150]

Exhibits	"R–1"	Plft.	Proof	Original & Duplicate Assessment Rolls, Jefferson St. Sidewalk
"	"S–1"	"	"	Original & Duplicate Assessment Rolls, Polk St. Sidewalk, Lawrence to Winslow Ave.
"	"T–1"	"	"	Original & Duplicate Asessment Roll, Lawrence St. Sidewalk
"	"U–1"	"	"	Original & Duplicate Assessment Roll, Madison St. Improvement from Wash. to Jeff. St.
"	"V–1"	"	"	Original & Duplicate Assessment Roll, Wash St. Sidewalk from Taylor to Monroe
"	"W–1"	"	"	Original & Duplicate Assessment Roll, Taylor St. Improvmt., Wash. to 3d St.

Dft. objects to offering ordinances Nos. —.
Overruled. Exception allowed.

No. 1261.

E. HEUSCHOBER

vs.

CITY OF PORT TOWNSEND.

Exhibits	"A"	Plft.	Proof	Ordinance No. —, Page —., Tyler to Lawrence
"	"B"	"	"	General Ordinance No. 117, Page 87
"	"C"	"	"	General Ordinance No. 160, Page 89
"	"D"	"	"	Original Contract between City & Saul Shoply, Tyler St. Improvement from Jefferson to Lawrence
"	"E"	"	"	Warrant No. 169
"	"F"	"	"	Duplicate & Original Assessment Rolls, Tyler St. Improvement from Jefferson St.

Dft. objects to offering Ordinance 295 & 216.
Overruled. Exception allowed.

No. 1536.

MERCHANTS BANK

VS.

CITY OF PORT TOWNSEND.

Exhibits "A" Plft. Proof Printed book of Ordinances.
" "B" " Ordinance No. 117
" "C" " Ordinance No. 160
" "D" " Ordinance No. 279
" "E" " Original Contract between City & McDougall, Adams St. from Washington to Lawrence
" "F" " Ordinance No. 216
" "G" " Ordinance No. 263
" "H" " Ordinance No. 336
" "I" " Ordinance No. 299
" "J" " Ordinance No. 301
" "K" " Ordinance No. 302
" "L" " Ordinance No. 240
" "M" " Ordinance No. 235

[151]

Exhibit "N" Plft. Proof Original Contract between City & W. C. Williams, Maple Avenue and Warrant No. 47 & Original & Duplicate Assessment Rolls
" "O" " Original Contract between City & Terry & McDougall, Fillmore St. from Washington to Lawrence, Warrant No. 70 & original & duplicate Assessment roll for same.
" "P" " Original Contract between City & Terry & McDougall, Washington St. Improvement from Quincy to Jackson & original & duplicate Assessment Rolls for same & Warrant No. 57
" "Q" " Original contract between City & Chas. O'Brien, C. St. from 1st to 8th & original and duplicate Assessment Rolls for same & Warrant No. 227
" "R" " Original contract between City & Chas. O'Brien, C & Ann St. & Warrant No. 60.
" "S" " Original contract between City & W. C. Williams, Washington St. & Fillmore St. Sidewalk & original & duplicate Assessment Rolls for same and Warrant No. 60.

"	"T"	"	Original contract between City & —, Taylor St. Improvement from Washington to 3d St. and original & duplicate Assessment Rolls for same & Warrant No. 191
"	"U"	"	Original contract between City & —, 2d St. Improvement from H to F St. & original & duplicate Assessment Rolls for same and Warrant No. 192.
"	"V"	"	Original contract between City & McDougall, Adams St. cribbing & original & duplicate Assessment Rolls for same, Warrant No. 100
"	"W"	"	Original contract between City & J. M. Lockhart, Adams St. Sidewalk & Original & Duplicate Assessment Rolls for same & Warrant No. 28.
"	"X"	"	Original contract between City & L. H. Cays, Polk St. Sidewalk & original & duplicate Assessment Rolls for same & Warrant No. 13.
"	"Y"	"	Original Contract between City & R. W. Forsythe, Madison St. Sidewalk & original & duplicate Assessment Rolls for same & Warrant No. 67.
"	"Z"	"	Original contract between City & Charles O'Brien, C & Ann St. original & duplicate Assessment Rolls for same & Warrant No. 245.
"	"A–1"	"	Original contract between City & Chas. O'Brien, C & Ann St. & original & duplicate Assessment Roll & Warrant No. 239.

No. 1537.

THE COMMERCIAL BANK

vs.

CITY OF PORT TOWNSEND.

Same pleadings, etc., as No. 1536. **[152]**

No. 1538.

THE MANCHESTER SAVINGS BANK

vs.

CITY OF PORT TOWNSEND.

Same pleadings, etc., as No. 1536.

No. 1539.

JOHN BARNESON

vs.

CITY OF PORT TOWNSEND.

Same pleadings, etc., as No. 1536.

In causes Nos. 1258—1259—1260—1261—1536—1537 1538 and 1539.

Judgment for plaintiffs.

1787.

Saturday, December 18, 1897.

R. C. HILL

vs.

J. W. STOCKAND et al.

MOTION TO CONFIRM SALE.

Order entered.

1790.

LANDES ESTATE CO.

vs.

YEP SUEY.

MOTION TO CONFIRM SALE.

State of Washington,
County of Jefferson,—ss.

I, J. J. Bishop, Clerk of the Superior Court in and for the County of Jefferson, State of Washing-

ton, holding terms at Port Townsend, do hereby certify that the above foregoing is a true copy of the original pages of the Minute-book of the records of the Superior Court of Jefferson County, State of Washington, for the day of December 18th, 1897, as the same appears of record in my office.

Witness my hand and the seal of said court this 8th day of May, 1915.

[Seal] J. J. BISHOP,
Clerk of Said Superior Court. [153]

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: Defendant's Draft of Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 22, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [154]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

FIRST NATIONAL BANK OF CENTRAL CITY,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Hearing on Settling, etc., Defendant's Proposed Bill of Exceptions.

Now on this day this cause comes on for hearing in open court, Chas. E. Shepard appearing for plaintiff and Hastings & Stedman and U. D. Gnagey appearing for defendant, whereupon plaintiff's counsel consents in open court to signing and filing of defendant's proposed bill of exceptions at this time, whereupon the Court signs bill of exceptions.

Dated May 22, 1916.

Journal 5, page 348. [155]

United States District Court, Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO, a Corporation.

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, WASHINGTON, a Municipal Corporation,

Defendant.

IN EQUITY—No. 1945.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND and CHARLES L. INTERMELA, City Treasurer of the City of Port Townsend,

Defendants.

Opinion.

Filed December 4, 1915.

CHARLES E. SHEPARD, Seattle, Wash., for Plaintiff.

U. D. GNAGEY, Port Townsend, Wash., HASTINGS & STEDMAN, Seattle, Wash., for Defendants.

NETERER, District Judge:

The plaintiff has commenced two actions; one at law, and one in equity; the law action against the City of Port Townsend, and the equitable action against the City of Port Townsend, and Charles L. Intermela, Treasurer of the City of Port Townsend. A trial by jury was waived in the law action, and both causes were by consent of parties tried together, both involving warrants of the same issue, but of different number. In the law action, the plaintiff alleges, in substance, that the amount involved is that within the jurisdiction of this court; that the plaintiff is a banking corporation, incorporated under the laws of the United States, and located and doing business at [156] Central City, State of Colorado, and pleads the corporate capacity of the City of Port Townsend, that it is a city of the third class of the State of Washington, and alleges that the Bank of British Columbia is a corporation, organized under a royal charter from the United Kingdom of Great Britain, with its principal place of business in Victoria, British Columbia; that the Manchester Savings Bank is a corporation organized under the laws of the

State of New Hampshire; and further alleged, in substance, that an action to recover damages for a breach of contract was prosecuted in the State Court of Jefferson County by the aforesaid banks respectively, and the court by decision found for the plaintiffs in the said actions, and judgment was entered on February 1, 1898; that the City Council, at a regular meeting which commenced on the 15th of February following, and continued to and including the 16th and 17th days of February, had under consideration the matter of paying said judgments, and that a proposition was then made looking to the settlement of the said judgments, and it was agreed that warrants should issue for the amount of the judgments and should bear interest at the rate of six per cent instead of ten as provided by the judgments, and that warrants were thereafter, on the 18th of February, duly issued pursuant to such arrangement, for such amount, and the number of warrants is set out, of which the following is a form:

"$500.00. Port Townsend, Wash., Feb. 18, 1898, No. 116.

(Seal) By order of City Council, Feb. 17, A. D. 1898, of the City of Port Townsend, Wash.

The Treasurer of said city will pay Bank of British Columbia, or order, Five Hundred —— 00/100 Dollars for part satisfaction of judgment of Bank

of British Columbia v. City, with int. at 6% per a. Indebtedness Fund.

D. H. HILL,
Mayor of the City of Port Townsend.
AUGUST DUDDENHAUSEN,
City Clerk." [157]

And that the warrants were duly assigned, for value, to the plaintiff, and that said warrants were entitled to be paid out of the money belonging to the indebtedness fund before any money then in that fund or which would come into that fund would be applicable to the payment of the said warrants in the order of the number of issuance, except about $300.00 prior indebtedness; and then states that the defendant city did levy one-tenth of a mill on its taxable property in 1898 and the same in 1899, and did make the levies for taxes for the payment of indebtedness from the indebtedness fund to and including the year 1908, but at no time was a levy made in excess of one mill on the dollar; and further states that the City of Port Townsend had a population of less than 20,000, and that under the laws of Washington, the delinquent taxes, under the act, approved March 6, 1897, for certain years were to be paid into the indebtedness fund; and then the complaint sets out practically the same facts with relation to the Manchester Savings Bank, and the assignment of the warrants to the plaintiff, the warrants being all of the same issue, and number alternating between the said banks; and alleges that these warrants were presented to the Treasurer of the City of Port Townsend on the 19th of February, 1898, for payment,

and payment was refused for want of funds, and such fact endorsed upon the back of the warrant. That after the warrant was so presented, it was for value sold and assigned to the plaintiff, who is now the owner and holder thereof. That on the 11th day of May, 1910, the plaintiff presented the warrant to the Treasurer of the defendant city, demanded payment, and the Treasurer refused payment, and the plaintiff "further shows that the said warrant, with 157 other warrants bearing the same date and made payable out of the indebtedness fund of said city, and numbered consecutively from 2 to 159, inclusive, have an aggregate value of $65,983.47. Sixteen of the causes of action are predicated upon warrants issued in the first instance to the [158] Bank of British Columbia, and the remaining counts are predicated upon warrants issued to the Manchester Savings Bank and sold to the plaintiff.

The defendant admits the corporate character of the concerns mentioned in the complaint, and denies all allegations which are inconsistent with its affirmative defense, and then it sets up an affirmative defense in which it alleges that an action was prosecuted in 1898 in the State Court by the Bank named, in which it was, in substance, alleged that on the 26th of February, 1890, the defendant city entered into a contract for the grading and filling of certain streets in Port Townsend, and that local assessment districts were established under the laws of the State, and the ordinances of the City, and a special assessment fund was established and warrants issued against this fund to the contractor, and the improve-

ments were paid in this way, the form of warrant being as follows:

"By order of the City Council, the Treasurer of the City of Port Townsend, Washington Territory pay to ——, or order, —— Dollars, and charge the same to the account of —— Street fund, being —— month —— year. Estimate of said street for ——.

THE CITY OF PORT TOWNSEND guarantees the principal with interest at ten per cent per annum.

————————————, Mayor.

Attest: ————————————, Clerk."

and then alleges that the time allowed by law to collect the assessments and provide the fund for the redemption of the warrants had long elapsed, and that the said City is barred by the statute of limitations from enforcing and collecting the assessments against the property and upon the lots and lands fronting upon the streets, etc., and that the plaintiff is prevented from obtaining payment of the warrants out of such fund; that such warrants were issued and endorsed to the plaintiff, and that [159] afterwards judgment was entered in the State Court upon such warrants in favor of the plaintiff; and alleges the same facts with relation to the Manchester Savings Bank, and states that judgment was entered in favor of the plaintiffs in the said several actions against the City, and that at the time of the entry of such judgment the Supreme Court of the State had held that the City could not be liable for any default of the officers in making the special assessments, and that the judgment was entered without authority at law, and the Court therefore was without jurisdic-

tion, and that the officers of the defendant City permitted the judgment to be entered through fraud, and seek to defend against the demands of the plaintiff in this action upon that contention, and state that at the time these warrants were issued the City was beyond its constitutional limit of indebtedness, and that the warrants could have no force.

In the equity action, after pleading the corporate capacity of the several corporations, including the defendant City, and setting forth the issuance of the warrants in suit and the aggregate amount of all of the warrants issued in the same series, it is alleged that the defendant City and its Treasurer diverted from the indebtedness fund moneys in that fund from the payment of these warrants and did not pay the warrants in the order of their issuance, except warrant No. 2, which was directed to be paid by the Court, and that by divers entries made upon the official books of account kept in the office of the City Treasurer, funds were transferred from the indebtedness fund to the account of current expense fund in large sums of money, and that payment of these warrants was refused on the 15th of February, 1910, and that the misplacing of the account in placing the account of the moneys belonging to the indebtedness fund of the City, tended to conceal the fact of the diversion of said fund from the plaintiff, and that the City and its Treasurer are thus violating the duty devolving upon them to [160] keep safely all moneys which should come into the Treasurer's hands, to apply the moneys belonging to the indebtedness fund to the City in payment of claims

other than such as were lawfully payable out of the moneys belonging to such fund; and alleges that it has no adequate remedy save in a court of equity; and then prays that the defendant be required to make full disclosures with relation to such fund, and be restrained from paying out any moneys which have been or shall be raised from taxes levied by the defendant City for the payment of indebtedness fund, or any moneys which have been collected since the 31st day of January, 1898, or shall be collected from the taxes levied by the defendant City for the year 1896 or previous years and from penalties and interest thereon, except to pay warrants which have been heretofore called in for payment upon the indebtedness fund of the defendant City, and warrants drawn payable out of the indebtedness fund of the defendant City, consecutively numbered 2 to 59 inclusive, pending this cause, those being of the issue of warrants which are in controversy here.

Upon application, a writ of injunction *pendente lite* was issued on the 31st day of May, 1911.

The defendants in this case answer substantially as they did in the law action, with the further objection to the Court's jurisdiction to hear and determine the matter.

Defendants interpose five grounds upon which to avoid the demand of the plaintiff. First, the warrants were all issued and ordered by the council at an adjourned meeting, contrary to the express prohibition of the statute of the State. Second, they were all issued in satisfaction of judgments that were void for want of power of the Court to render

such a judgment upon the cause of action set forth in the complaint. Third, these actions have not been commenced within the time required by law. Fourth, the facts presented to the Court show (a) that the judgments in satisfaction of which these warrants were issued were the result of the same collusion, and were a fraud in law upon [161] the tax-payers. Fifth, that at the time the judgments were taken against the city, the warrants in suit were issued, and at the time the warrants in suit themselves were issued, the City was indebted over and above the constitutional debt limit, and hence these warrants were void, the warrants themselves having been issued in pursuance of a new agreement between the City Council and a warrant holder other than the judgments.

A careful examination of the decision of the Circuit Court of Appeals in Perkins v. Intermela, 205 Fed. 603, it would seem, concludes every contention in the law case against the defendants. The Perkins, *supra,* case, was an action to recover from the City Treasurer the par value and interest of warrant No. 2 of the issue of the series of warrants of which the warrants in issue in this case are a part. It is contended by counsel that the facts in this case can be distinguished from the facts presented in that case, and endeavor to controvert the presumption indulged in by the Court with relation to the adjourned meeting. To me, the distinction is not apparent when applied to the facts in this case. This matter was under continuous consideration. The

"adjournment" was merely a temporary cessation or dismissal, Tipton v. Parker, 74 S. W. 298. This matter of issuance of the warrants was not inaugurated at the resumed session, or taken up after indefinite postponement. No one was misled or surprised by its being taken up at this time. There was no secret action or conduct with relation to it. The Circuit Court of Appeals specifically takes up and disposes of the "adjourned meeting," and likewise the power of the City Council and the Court under the "ordinance provision," and also in the same manner disposes of the limitation of indebtedness, by stating on page 609:

> "There is no evidence in the record showing that the City of Port Townsend was indebted beyond its statutory limitations at the time the indebtedness was incurred *for the local street improvements in question.*"

The same can be said of this case. There is evidence of indebtedness [**162**] covering the whole time from the inception of the local improvement warrants to the issuance of the warrants in suit, and evidence of the City's assets at the time the warrants in suit were issued, but there is no evidence as to what assets the City had at the time the improvement warrants were issued and which were the basis of the judgment which supports the warrants in issue in this case. I do not think that if a liability exists that the indebtedness at the time of the issuance of the warrants in this case controls, but rather the indebtedness at the time the local improve-

ment was contracted, as stated by the Circuit Court of Appeals. The Court did not pass expressly upon the question of fraud, although it is stated that the issue was raised and discussed orally and in the briefs. I do not think from the record in this case that the Court can say from the issues raised or tendered in that behalf that fraud was practiced. Four of the cases in which judgments were entered and which are the basis for some of the warrants had been before the Supreme Court of the State upon appeal and the complaints held sufficient, while the question here sought to be raised does not appear to have been raised before the Supreme Court. The matter before the Court being merely a matter of pleading sufficient facts, and not going to the merits of the case, it could be forcefully argued that the doctrine of *stare decisis* applied and was controlling as to these cases. At any rate, whatever was done was not done to mislead the Court as to any fact.

The Court did have jurisdiction, and the particular case having been before the Supreme Court, the law of those cases may have been established. The Circuit Court, in Intermela v. Perkins, *supra,* at page 609, says:

> "It is at least a disputed question whether such indebtedness as may be thrust upon the City by neglect or refusal to perform its obligations with contractors for local improvements in providing funds for the payment of such contractors, falls within the inhibition against incurring indebtedness beyond a specified sum.

Baker v. City of Seattle, 2 Wash. 576, 27 Pac. 462; Winston v. City of Spokane, 12 Wash. 524, 41 Pac. 888; McEwan v. City of Spokane, 16 Wash. 212, 47 Pac. 433; **[163]** Denny v. City of Spokane, 79 Fed. 719, 25 C. C. A. 164. But be that as it may, in any event the question is one involving the application of general law in connection with statutory construction, which a court of general jurisdiction is competent to entertain and decide."

Nor is the contention as to the statute of limitations persuasive, because it appears in this case that taxes were levied to supply this indebtedness fund, and nowhere do the facts justify the Court in concluding that such a demand had been made for the payment of money when the City was in a condition to pay and payment refused, as would bring the warrant holder within this limitation. Nor is the contention that the judgments were rendered by consent and therefore open to attack sustained by the record. The record shows that an answer was filed, issue was taken upon every traversable fact in the complaint, and findings of fact and conclusions of law were filed, the decree entered pursuant to the findings of fact and conclusions of law, based upon the testimony tendered in support of the issues. There is nothing in the record to show what the testimony was; nor is there any allegation of fraud practiced upon the Court or by the Court which resulted in the findings, conclusions, and deree. My attention is called to State ex rel. Bradway v. Demat-

tos, Mayor of Bellingham, filed by the State Supreme Court, November 10, 1915, in which the Court holds that an attempt to enforce a "consent" judgment entered against a municipality by mandamus, the answer setting up the fact of consent to judgment, is to be treated as a direct and not a collateral attack, and that full inquiry can be made into the entire transaction, and that such a judgment is not *res adjudicata,* and that want of power or authority to consent may always be shown to avoid the judgment whenever the record shows that it was rendered on consent, as shown in that case. This case does not apply.

It is urged as one of the grounds of fraud that so many exhibits were presented in the several causes that counsel could not, during the time that the causes were presented, have examined **[164]** them, showing affirmatively that testimony was presented upon the issue on trial, and in the absence of allegations of fraud on the part of the Court and litigants predicated upon facts set out, U. S. v. Atherton, 102 U. S. 372; James v. Germania Iron Co., 107 Fed. 597, upon the authority of Intermela v. Perkins, supra, and First National Bank of the City of Port Townsend, 184 Fed. 574, I think that judgment should be entered in favor of plaintiff as prayed for.

All of the warrants in the law action are involved in the equity action, and as many more that were issued to citizens of the State and who could not sue in this court. The fact that the plaintiff is a National Bank does not have this right since the act

of July 12, 1882, which provided that the jurisdiction for suits in the Federal Courts by or against a National Bank shall be the same as other persons, Whittemore v. Moskeag National Bank, 134 U. S. 527. Diversity of citizenship in suits by or against National Banks being a prerequisite, Danahy v. National Bank of Denison, 64 Fed. 148, this court has not jurisdiction of the warrants issued to citizens of the State of Washington. At bar the suggestion was made that unless the plaintiff dismissed as to the warrants issued to citizens of the State the action could not be maintained. Plaintiff declined to dismiss, contending that since this was not an action to recover on the warrants but rather to enjoin the diversion of a fund that the court had jurisdiction, I think this case comes squarely within Hooe v. Jamieson, 166 U. S. 395, and that the bill in equity should be dismissed.

JEREMIAH NETERER,
Judge. **[165]**

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 3, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[166]**

In the United States District Court for the Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF CENTRAL CITY,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Assignment of Errors.

Comes now the defendant herein and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled cause:

1. The Court erred in overruling defendant's demurrer to the amended complaint on the ground that the said amended complaint does not state facts sufficient to constitute a cause of action.

2. The Court erred in overruling defendants demurrer to the amended complaint on the ground that the said action was not commenced within the time required by law.

3. The Court erred in overruling defendant's objection made at the trial to the introduction of any evidence in this action on the ground that the said action had before said trial been dismissed because the plaintiff upon the Court's sustaining defendant's demurrer to the original complaint refused to plead further, and such judgment of dismissal has never been reversed and is now and was at the time of the trial a final judgment in this cause.

4. The Court erred in overruling defendant's objection to the introduction of the warrants in suit on the ground that they were not properly endorsed to show title in the plaintiff.

5. The Court erred in sustaining plaintiff's objection to the witness' George Anderson's stating, after such witness had duly qualified and shown that he had been City Clerk for over seven years and that one of his duties is to keep the minutes of the

City Council [167] how the meetings of the City Council at that time (the time of issuing the warrants in suit) compared in length with the meetings of the present council, and how long it takes the City Council as a rule to transact the business at their meetings.

6. The Court erred in overruling defendant's objection to the introduction of testimony showing that the case of the Bank of British Columbia vs. The City of Port Townsend, in part satisfaction of the judgment obtained in which said case, part of the warrants in suit were issued, is the same case that had been to the Supreme Court of the State and reported in 16 Washington reports at page 450, on the ground that such testimony was immaterial under the pleadings in this case, and in overruling defendant's objection to the Court's allowing the plaintiff to amend his reply so as to allege such fact and make such testimony material.

7. The Court erred in not sustaining defendant's objection to the introduction in evidence as an asset of the city for the purpose of determining whether the city had reached the constitutional debt limit, that part of the report of the Bureau of Inspection of the State of Washington for the City of Port Townsend, in which the value of the City Hall of such City is estimated, on the ground that the same is irrelevant and immaterial.

8. The Court erred in refusing to make the second finding of fact requested by the defendant in regard to the incorporation of the said defendant, showing what kind of corporation the said city was

and what powers it had at the time the original street grade warrants were issued.

9. The Court erred in refusing to make the third finding of fact requested by the defendant showing that the two cases, in part satisfaction of the judgment in which said cases, the warrants in suit were issued, together with six other cases, together with some other matters, were all tried transacted on the day as shown by **[168]** Defendant's Exhibit 1.

10. The Court erred in refusing to make the fourth finding of fact requested by the defendant and the last, part of the third requested finding, showing when the findings and judgments in the case of the Manchester Savings Bank vs. The City of Port Townsend, and the case of the Bank of British Columbia vs. said city, were signed and when the same were filed with the clerk.

11. The Court erred in refusing to make the seventh finding of fact requested by the defendant showing that "No contract, ordinance or resolution authorized the City of Port Townsend to guaranty the payment of any of the original street grade warrants."

12. The Court erred in refusing to make the eighth, ninth, tenth, eleventh and twelfth findings of fact requested by the defendant showing the general way in which the City Council dealt with the holders of street grade warrants and the result of their dealings, and now and under what circumstances the warrants in suit were issued.

13. The Court erred in refusing to make that part of the sixteenth finding of fact requested by

the defendant showing that no levy was ever made by the city council for the purpose of paying any of the series of warrants known as the "judgment warrants."

14. The Court erred in refusing to make the 18th finding of fact requested by the defendant, setting forth section 9 of ordinance No. 722, showing what moneys were placed in the Indebtedness Fund besides those moneys required to be placed there by law and the disposition made of them.

15. The Court erred in refusing to make the 19th, 20th, 21st and 22d finding, requested by the defendant, showing the financial condition of the City of Port Townsend during the years 1897 and 1898. **[169]**

16. The Court erred in refusing to make the 23d finding of fact requested by the defendant, showing that the city authorities had full knowledge of the decision of the Supreme Court of the State in the case of German-American Savings Bank vs. The City of Spokane, reported in 17 Washington Reports, page 315, and that the decision was a matter of common knowledge, at and before the time the said city authorities dealt with the street grade warrant holders and allowed the judgments to be taken and to be paid without appealing which resulted in the issuing of the warrants in suit.

17. The Court erred in refusing to make the 24th finding requested by the defendant showing that the regular meeting of the City Council held on February 15, 1898, was a short meeting, and that the city council adjourned from the 15th to the 16th and

from the 16th to the 17th of February, not because they had too much business to be transacted on the evening of the regular meeting but because the business they wanted to transact was not ripe for transaction.

18. The Court erred in refusing to make the additional finding of fact requested by the defendant showing that the defense interposed by the City of Port Townsend in all the street grade warrant cases was merely formal, that no proof was offered in behalf of the said defendant city of Port Townsend in said actions, but that that judgment was entered in all of the said suits by the consent of the City officers, and that no appeals were taken.

19. The Court erred in giving judgment for the plaintiff on the findings as made because the said findings do not sustain the judgment.

20. The Court erred in refusing to hold that the warrants in suit were issued in pursuance of a special agreement made between certain so-called street grade warrant holders and the City Council and its Mayor, which said agreement was entered into at an **[170]** adjourned meeting of said Council, against the express provision of the laws of Washington.

21. The Court erred in not holding that the warrants in suit were issued at an adjourned meeting of the City Council against the express provisions of the laws of Washington and are therefore illegal and void, and in refusing to find as requested by defendant that said warrants were so issued and are therefore illegal and void.

22. The Court erred in rendering a general judgment against the defendant for the amount of the warrants and in not limiting the payment of said judgment to payment out of the Indebtendess Fund as provided by law.

U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

Service of the within assignment of errors by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 28, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. **[171]**

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Petition for Writ of Error.

And now comes the City of Port Townsend, Washington, the defendant herein, and says that on or

about the 31st day of January, 1916, this Court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

U. D. GNAGEY,
Attorney for Defendant.
HASTINGS & STEDMAN,
Of Counsel for Defendant.

Service of the within petition for writ of errors by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff. **[172]**

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 28, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. **[173]**

In the District Court of the United States for the Western District of Washington, Northern Division.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Order Allowing Writ of Error.

This 28th day of June, 1916, came the defendant City of Port Townsend, Washington, by his attorney, and filed herein and presented to the Court his petition, praying for the allowance of a Writ of Error, an Assignment of Errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the Writ of Error upon the defendant giving bond according to law in the sum of six hundred and fifty dollars, which shall operate as a supersedeas bond.

Done in open court this 28th day of June, 1916.

JEREMIAH NETERER,

Judge.

Service of the within order allowing writ of error by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

[Indorsed]: Order Allowing Writ of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 28, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [174]

In the District Court of the United States for the Western District of Washington, Northern Division.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, the City of Port Townsend, Washington, a municipal corporation of the third class in said State, as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., as surety, are held and firmly bound unto the defendant in error, plaintiff, First National Bank of Central City, Colorado, in the full and just sum of six hundred and fifty ($650.00) dollars, to be paid to the said plaintiff, First National Bank of Central City,

Colorado, his certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 28th day of June, in the year of our Lord one thousand nine hundred sixteen.

Whereas, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court, between the First National Bank of Central City, Colorado, plaintiff, and The City of Port Townsend, Washington, a municipal corporation, defendant, a judgment was rendered against the said City of Port Townsend, Washington, defendant, and the said City of Port Townsend, Washington, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the [175] said judgment in the aforesaid suit, and a citation directed to the said First National Bank of Central City, Colorado, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit on the 28th day of July, next.

Now, therefore, the condition of the above obligation is such that if the said City of Port Townsend, Washington, shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation

to be void, otherwise to remain in full force and virtue.

THE CITY OF PORT TOWNSEND.
By U. D. GNAGEY,
Its Attorney and City Attorney.
UNITED STATES FIDELITY & GUARANTY CO.
By JOHN C. McCOLLISTER, (Seal)
Attorney in Fact.

Approved:
JEREMIAH NETERER,
District Judge.

Service of the within bond on writ of error by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

[Indorsed]: Bond on Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division. June 28, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [176]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND,
Defendant.

Stipulation for Transmission of Original Exhibits to Appellate Court.

It is hereby stipulated and agreed that the clerk of this court may transmit, with the record, to the Circuit Court of Appeals, the original warrants introduced by plaintiff in evidence herein, in lieu of copies thereof.

Dated this July 20th, 1916.

CHARLES E. SHEPARD,
Attorney for Plaintiff.

U. D. GNAGEY,
HASTINGS & STEDMAN,
Attorneys for Defendant.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 21, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [176a]

In the District Court of the United States for the Western District of Washington, Northern Division.

AT LAW—No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Order Directing Transmission of Original Exhibits to Appellate Court.

Upon stipulation of attorneys for the respective parties hereto, it is hereby ordered that the clerk of this court do transmit with the transcript in this case the original warrants introduced in evidence by the plaintiffs in this cause.

Done in open court this 21st day of July, A. D. 1916.

JEREMIAH NETERER,
Judge.

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 21, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [176b]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

CITY OF PORT TOWNSEND,
Plaintiff in Error,
vs.
FIRST NATIONAL BANK OF CENTRAL CITY,
Defendant in Error.

Praecipe for Transcript of Record.

To the Clerk of the above-entitled court:

You will please prepare and certify, as a tran-

script for use on hearing of writ of error, the following papers:

Amended complaint.

Demurrer to amended complaint.

Order overruling demurrer.

Answer of defendant.

Appearance of Charles E. Shepard as attorney for plaintiff and notice.

Order allowing amendments to answer.

Amendments to answer.

Order allowing plaintiff to amend its reply.

Amended reply.

Stipulation waiving jury trial.

Findings proposed by defendant.

Findings of fact and conclusions of law.

Exceptions to findings of fact and conclusions of law and to the refusal of the court to make certain findings.

Judgment.

Exceptions to judgment.

Order allowing defendant's exceptions. **[177]**

Stipulation and Order extending time in which to prepare and serve proposed bill of exceptions.

Minutes of the Clerk of April 24, 1916, showing permission to defendant to withdraw bill of exceptions to incorporate amendments, and

Minutes fixing amount of supersedeas.

Notice of Settling bill of exceptions.

Bill of Exceptions.

Minutes of Clerk of May 22, 1916, showing consent of plaintiff to settlement of bill of exceptions at that time.

Memorandum Opinion of Court.
Petition for Writ of Error.
Assignment of Errors.
Order Allowing same.
Writ of Error.
Bond.
Citation.

U. D. GNAGEY,
L. B. STEDMAN,
Attorneys for Plaintiff in Error.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

U. D. GNAGEY.

[Indorsed]: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 5, 1916. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy. **[178]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 1872.

THE FIRST NATIONAL BANK OF CENTRAL CITY, Colorado,
Plaintiff.

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record, etc.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 178, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court and that the same constitute the record on return to said Writ of Error herein from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [179]

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return—569 folios at 15c.....	$85.35
Certificate of Clerk to transcript of record—4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to original exhibit—3 folios at 15c.....	.45
Seal to said Certificate.....	.20
	$86.80

I hereby certify that the cost for preparing and certifying record amounting to $86.80 has been paid to me by U. D. Gnagey, Esq., and Messrs. Hastings & Stedman, Attorneys for Plaintiff in Error.

I further certify that I hereby attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 24th day of July, 1916.

[Seal] FRANK L. CROSBY,
Clerk U. S. District Court. **[180]**

Writ of Error.

United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.
The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of you, between The First National Bank of Central City, Colorado, plaintiff, and the City of Port Townsend, defendant, a manifest error hath happened, to the great damage of the said City of Port Townsend, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, State of California, in said Circuit, on the 28th day of July, 1916, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of

appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 28 day of June, 1916.

Attest:

JEREMIAH NETERER,
U. S. District Judge.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States, Western District of Washington, Northern Division. [181]

Service of the within Writ of Error by delivery of a copy to the undersigned is hereby acknowledged this 28 day of June, 1916.

_____,
Attorney for Plaintiff.

[Endorsed]: (Original.) No. 1872. In the Circuit Court of Appeals of the United States for the Ninth Circuit. First National Bank of Central City, Colorado, Plaintiff, vs. City of Port Townsend, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 28, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [182]

United States Circuit Court of Appeals for the Ninth Circuit.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States to The First National Bank of Central City, Colorado, and to Charles E. Shepard, Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein The City of Port Townsend, Washington, a municipal corporation of the third class in said State, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 28 day of June, A. D.

1916, and of the Independence of the United States the one hundred and fortieth.

JEREMIAH NETERER,
United States District Judge.

Attest:
[Seal] FRANK L. CROSBY,
Clerk. [183]

I hereby, this 28 day of June, 1916, accept due personal service of the foregoing citation on behalf of the First National Bank of Central City, Colorado, the defendant in error.

CHARLES E. SHEPARD,
C. W. R.
Attorney for Defendant in Error. [184]

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1916.

CHARLES E. SHEPARD,
C. W. R.
Attorney for Plff.

[Endorsed]: (Original.) No. 1872. In the District Court of the United States for the Western District of Washington, Northern Division. First National Bank of Central City, etc., vs. The City of Port Townsend. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 28, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [185]

[Endorsed]: No. 2833. United States Circuit Court of Appeals for the Ninth Circuit. The City of Port Townsend, a Municipal Corporation, Plaintiff in Error, vs. The First National Bank of Central City, Colorado, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 27, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2833

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF PORT TOWNSEND, Washington,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, Colorado,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF N ERROR

U. D. GNAGEY,
L. B. STEDMAN,
Attorneys for Plaintiff in Error.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

No. 2833

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF PORT TOWNSEND, Washington,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, Colorado,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

U. D. GNAGEY,
L. B. STEDMAN,
Attorneys for Plaintiff in Error.

This is a writ of error to review the final judgment of the District Court of the Western District of the State of Washington, Northern Division, rendered in favor of the plaintiff below The First National Bank of Central City, Colorado.

STATEMENT OF THE CASE

This is an action at law brought by the First National Bank of Central City Colorado, against the City of Port Townsend, Washington, on certain warrants issued by the City of Port Townsend, Washington, drawn on the Indebtedness Fund of said city. Although brought as an action at law in form as for a money judgment, the object of the action is really to obtain a writ of mandamus against the city officers to compel them to levy a tax for the Indebtedness Fund of said city to provide the necessary means to pay the said warrants. Under the act of the Legislature creating said fund, entitled "An Act relating to the taxes and funds of municipal corporations having less than twenty thousand inhabitants", approved March 16, 1897, the city council of the city is authorized to make a levy for said fund not exceeding six mills on the dollar.

The case was before this court as number 1882, 184 Fed. 574, on a writ of error taken by the plaintiff below from a judgment of dismissal after the sustaining of defendant's demurrer to the complaint and

a refusal on the part of said plaintiff to plead further. This court sustained the lower court and held that the complaint did not state a cause of action, holding that the plaintiff must allege facts which in a court of the state would entitle it to a writ of mandamus, but afterwards on a petition for re-hearing the plaintiff was permitted to file an amended complaint.

After the mandate of this court was sent down, the plaintiff filed an amended complaint, and the defendant answered after its demurrer to the amended complaint was overruled. The plaintiff replied, and upon the issues thus made, the case was tried by the Court without a jury, a stipulation waiving a jury trial having been duly filed by the parties before the trial. (Record, p. 109). The parties also signed and filed a stipulation of facts (Record, p. 137), and upon this stipulation of facts and the other evidence submitted according to such stipulation, the case was submitted to the Court.

The Court rendered an unconditional money judgment in favor of the plaintiff for the full amount of the warrants involved, at the date of such judgment. At the proper time the defendant requested special findings, the Court made such findings after both parties had proposed findings, and upon the findings so made this judgment was rendered. The defendant brings the case here on a writ of error after having a bill of exceptions settled containing all the evidence.

The warrants sued on arose as follows: During the years 1889 and 1890, the City of Port Townsend graded a number of its streets by what is known as the special assessment plan. For this purpose the city created local improvement districts embracing the property abutting upon the improvements, had the improvements made in each district by contract as provided by law and the ordinances of said city, levied special assessments on the property included in each local improvement district, created a special fund in each district, and in payment of the work thus done issued warrants drawn on the local improvement funds in each district and delivered them to the contractor in payment of his contract. These warrants and all warrants of a similar origin have long and generally been known in the State of Washington as Street Grade Warrants and they will be so designated in this brief.

The assessments so made were not all paid and as a result a large amount of the street grade warrants remained unpaid. The holders of these street grade warrants brought suit on them against the city in the superior court of Jefferson County, the county in which said city of Port Townsend is located. In the first nine of the suits so brought, the city appeared by its city attorney and contested the same, as it appears from the face of the record, but the defendant contends that such contest was bona fide only up to a

certain stage in the progress of the suits, and that judgment in at least eight of these cases was finally taken by consent. Four of these cases were commenced the latter part of the year 1893 and the other four of the eight that were tried together in 1895 and the last of the nine cases mentioned was commenced in 1897. This last case was disposed of in the case of *David Perkins vs. Intermela* and need concern us no further.

The history of the progress of the first eight cases was briefly as follows: The city's demurrer to the second amended complaint in each of the first four of these cases, brought on such street grade warrants was sustained below for want of facts. Upon the sustaining of the demurrers to the second amended complaints, the plaintiffs refused to plead further and the cases were dismissed. From this judgment of dismissal appeals were taken to the supreme court of the state. The supreme court reversed the judgment of dismissal and held the second amended complaints in these cases good. In one of these cases, that of the *Bank of British Columbia vs. Port Townsend,* the supreme court wrote an opinion which is found in the 16 *Wash.* 450. The other three cases according to stipulation, as it appears from the reported cases, were disposed of in the same manner as the Bank of British Columbia case, 16 Wash. 701-2.

These cases were all reversed by the supreme court as stated, and the lower court was instructed to overrule the demurrer and they were sent back for further proceedings. The opinion in the Bank of British Columbia case was rendered as appears from the reports February 11, 1897. The effect of the decision in this case was to hold incidentally at least that the second amended complaint states a cause of action against the city.

The other four cases were allowed to rest meanwhile, so that when these four cases were sent back for further proceedings, the eight cases were pending in the superior court and undisposed of. During the latter part of the year they all became active and were disposed of. They were all tried, according to the records of the superior court, defendant's exhibit 1, record p. 195, on Saturday December 18, 1897, and judgment in all of the cases was immediately announced in favor of the plaintiffs (Record, p. 201). Findings in all the cases were signed on January 19th and 20th, in four on the 19th and in the other four on the 20th. In the first four the judgment was also signed on January 19, but neither the findings nor the judgment in said cases were filed with the clerk until February 1st following. The findings in the other four cases were filed on February 2nd and the judgments in such cases were signed and filed February 5th. No appeal was taken in any of these eight cases.

On February 15, 1898, the city council met in regular session according to ordinance, at which said meeting a notice was read, a "notice of Atty's in Street Grade Warrant cases" (Exhibit B, record, p. 191). After the reading of such notice and the transaction of other business in no way connected with said cases, the city council took a "recess" till 3 o'clock P. M. February 16, 1898. (The minutes uses the word "recess" but defendant contends it was an adjournment.) The next day the full council met pursuant to this recess (so called) and the only matter discussed was the payment of these street grade warrant judgments, and a proposition was made by the city council to pay these judgments in warrants drawn on the Indebtedness Fund of said city bearing six per cent interest instead of ten, the interest the street grade warrants and the judgments bore. This proposition was put in the form of a resolution and made as an offer to the judgment creditors, and then the council took another "recess" (adjournment according to defendant's contention) to meet the following day February 17th. At this last meeting the judgment creditors accepted the proposition and the council ordered the warrants drawn on the Indebtedness Fund of said city and were delivered to the judgment creditors in payment of the judgments. A copy of the minutes of February 15th is found at page 188, *et seq.* (Exhibit B); a copy of the resolution adopted at page 144, and a

copy of the acceptance by the judgment creditors at page 145, of the record. The record does not show that any action whatever was taken in regard to the notice that was read at the regular meeting held on the 15th, relating to the street grade warrant cases.

All these judgments together, including the judgment in the Alonzo Elliott case which was disposed of in the Intermela case, amounted to over $67,000, and warrants to this amount were issued to the judgment creditors mentioned in the resolution at page 144 of the record. Part of the warrants involved in this suit were issued in part satisfaction of the judgment so obtained by the Bank of British Columbia and the remainder in part satisfaction of the judgment so obtained by the Manchester Savings Bank.

The decisions of the supreme court of the State, it may be admitted, were not always consistent up to July 9th, 1897, on the question whether the city was liable on street grade warrants. But before any of the street grade warrant cases herein mentioned went to judgment, the supreme court of the state had definitely decided the law in Washington, to be that cities cannot be held generally liable on street grade warrants. This decision was made on July 9, 1897, in the case of the *German-American Savings Bank vs. Spokane,* 17 Wash., 315, hereinafter to be known as the Spokane case. This decision was thus rendered nearly seven months before these judgments were

taken, and more than five months before the cases were tried.

There is testimony to the effect that this decision was known at least to the legal department of the city and to some of the attorneys who conducted the street grade warrant cases against the city, in the fall and winter of 1897. The testimony of Mr. Coleman is direct and positive to the point that he gave the members of the city council advice as to the liability of the city based on this decision, after the street grade warrant judgments were rendered, but before they were paid (Record, p. 164).

The defendant city after a general denial of certain allegations in the amended complaint, which it will not be necessary to note specifically here, set up in its answer certain affirmative defenses and attacked the legality of the warrants in suit on the following grounds briefly stated:

1. That the superior court had no power to render the street grade warrant judgments against the city on the causes of action set forth in the complaints in said causes; that said judgments and the warrants issued in payment of the same were a fraud against the taxpayers; that the defense interposed by the city officers in the street grade warrants were not bona fide, and that the judgments were really taken by consent.

2. That all of the warrants involved in this

action were ordered by the city council at an adjourned meeting of the council and not at a regular meeting of said council as required by law.

3. That at the time the said street grade warrant judgments were taken and at the time the Indebtedness Fund warrants were issued, the city of Port Townsend was in debt beyond its constitutional limitation.

4. That this action has not been commensed within the time required by law.

ASSIGNMENT OF ERRORS

Errors relied on by the plaintiff in error for a reversal, assigned in the order in which they will be argued.

1. The Court erred in overruling defendant's objection to the introduction of the warrants involved on the ground that the said warrants are not endorsed properly to show title in the plaintiff.

2. The Court erred in rendering judgment for the plaintiff below on the findings made by the Court, because the findings do not support the judgment.

3. The Court erred in rendering an unconditional money judgment against the city without limiting the same to payment out of the indebtedness fund on which the said warrants are drawn and out of which they are payable under the law creating the said fund and

under the contract authorizing the issuing of the same, and also, in including in the said judgment interest on the said warrants to the date of the judgment.

4. The Court erred in making the 18th finding of fact which read as follows:

"18. There is now due to the plaintiff from the defendant upon the warrants enumerated in the seventh findings, thirteen thousand, nine hundred fifty-two dollars, eighty cents ($13,952.80), with interest at six per cent per year on six thousand seventy-two dollars ,eighty cents ($6,072.80) thereof from February 18, 1898, and on seven thousand, eight hundred eighty dollars ($7,880.00) thereof from February 19, 1898." (Record, p. 116-117.)

The objection to this finding is that it is a conclusion of law and it is capable of a double construction. If taken as a finding of fact as such it is contrary to the evidence and not supported either by the evidence or the pleadings in the case.

5. The Court erred in overruling the demurrer to the amended complaint, the said demurrer having been interposed on two grounds: 1. On the ground that the said amended complaint does not state facts sufficient to constitute a cause of action. 2. On the ground that the said action has not been commenced within the time required by law. (Record, p. 22.)

6. The Court erred in failing and refusing to find and hold generally from the pleadings and the evidence introduced, that the warrants are outlawed

and that no suit can be maintained thereon at this time for the purpose disclosed by the record, the record showing that the cause of action arose more than ten years before the commencement of this action, and more than thirteen years before the filing of the amended complaint herein.

7. The Court erred in not holding generally all the warrants involved in this suit illegal and void, because issued at a time, and authorized to be issued by virtue of an order and resolution passed at a time, expressly prohibited by the laws of Washington, that is, at an adjourned regular meeting of the city council.

8. The Court erred in not holding the street grade warrant judgments as judgments rendered by consent and fraudulent and void as against the taxpayers of the city, and in not holding the warrants drawn on the Indebtedness Fund of said city in satisfaction thereof, likewise fraudulent and void as against the taxpayers of said city.

And in this connection the Court erred in making the 14th finding of fact which reads as follows:

"14. There was no fraud or fraudulent collusion or acquiescence in the payment of an unlawful claim, on the part of the mayor and City Council in authorizing the payment of said judgments by said warrants, disclosed by the evidence, or in the acts of the Mayor and City Clerk in issuing said warrants."

This is a conclusion of law, but taken as a finding of fact it is contrary to the evidence.

9. The Court erred in not holding generally and in not finding from the pleadings and the evidence that the warrants in suit were illegal and void because issued over and above the constitutional limitation of indebtedness.

ARGUMENT

1. The first error assigned is the overruling of defendant's objection to the introduction of the warrants in suit on the ground that the endorsement on the warrants is not sufficient to show title in the plaintiff, which ruling was duly excepted to by the defendant. The original warrants are in the hands of this court so that they may be easily inspected. We simply desire to reserve this objection for oral argument in case it becomes necessary.

2. The second assignment of error involves the question whether the findings made by the Court sustain the judgment.

When this cause was before this court on the former writ of error, it was decided by this court that, as no suit can be maintained in the state of Washington on a municipal warrant of any kind, but only a mandamus proceeding to compel the proper officers to do their duty as provided by law with reference to its payment or with reference to providing

the proper funds to pay, and as the United States Courts have no jurisdiction to issue a writ of mandamus, except to enforce a judgment theretofore obtained, the plaintiff had the right to maintain this action in the United States Courts for the purpose of obtaining a judgment at law so that the court could issue the writ of mandamus to enforce such judgment. The Court says:

"Since the facts alleged in the complaint herein are insufficient to show that the plaintiff in error would have a right to the writ of mandamus in a court of the state, they are insufficient to show that the defendant (plaintiff) is entitled to a judgment at law in this action."

First National Bank of Central City vs. City of Port Townsend, 184 Fed. 574.

A brief examination of the findings shows that they are not sufficient to show that the plaintiff is entitled to a writ of mandate in a court of the state.

There is nothing in these findings to show the condition of the indebtedness fund, except the finding that certain levies have been made for the fund in the past and that no levy has been made since 1908, but as this fund is to be maintained by moneys coming from other sources, these findings in themselves cannot inform the Court what the condition of the fund is, and hence one of the essentials, according to the decision in the case of *State ex rel. American Freehold-Land Mortgage Company vs. Mutty,* 39

Wash. 624, is missing. This case goes into this matter extensively and is quoted at great length by this court in sustaining the demurrer to the original complaint in this cause.

To explain more fully why these findings are insufficient, it is only necessary to note the different sources from which the Indebtedness Fund is supplied. These sources are as follows:

First, From the levy of a special tax for said fund not exceeding six mills on the dollar. This is according to the provision of section three of an act of the legislature, the title of which is set out in full in the first paragraph of this brief, which, among other things, provides: "Such municipal corporation shall levy and collect annually * * * a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar."

Second: Section seven of this same act gives another source from which this fund is to be replenished. This section reads as follows:

Sec. 7. All moneys collected on and after the first day of February, 1898, from taxes of the year 1896, and previous years, and from penalty and interest thereon, shall be paid into the indebtedness fund.

A third source for this fund is the proceeds of the sale of county property forfeited to the county for delinquent taxes, all of which are to be paid into the

indebtedness fund according to section nine of ordinance No. 722, a copy of which said section is set out in full on page 161 of the record. According to this section the city's share of the proceeds of the sale of county property is to be turned into this fund, whether the said property has been forfeited to the county for the taxes for the year 1896 or previous years, or whether it has been so forfeited to the county for the delinquent taxes for years subsequent to the year 1896.

The City Council is not required to make the full levy of six mills every year under this act of the legislature. In this connection the Court in the case of *State ex rel. American, Etc. Company vs. Mutty,* 39 Wash. 624, at page 626, says: The statute of 1897, which provided for the establishment of the indebtedness and current expense funds as separate and distinct funds, authorized the annual levy of a tax for the former not exceeding six mills on the dollar. Bal. Code, § 1792 (This is section three of the Act just described). The levy to the full amount of six mills annually is not mandatory, and there must be some discretion lodged with the appellants (city council) as to the amount necessary to be levied in any one year. Bal. Code, § 1794" (This is section five of the same act). This discretion is to be exercised by the city council and in so doing it is to take into consideration the whole amount of the indebtedness existing

as well as the condition of the fund, in the way of uncollected taxes and cash on hand.

The findings do not even state the amount of cash in the fund. The Court in the Mutty case at page 627 goes on to say: "It is manifest that the council should not only take into consideration the amount of the outstanding indebtedness, but should also consider it with reference to the means which have already been provided for payment, by way of cash on hand, and of previously levied and uncollected taxes."

According to the decisions of the state court then which has been followed by this court in this case, the findings do not show that the plaintiff is entitled to the writ of mandamus and hence do not show that it is entitled to this judgment. The findings show neither the amount of cash on hand in this fund nor the amount of uncollected taxes that will come into this fund, nor the amount that will be received by the city to the credit of this fund as its share of the proceeds of the sale of county property, forfeited to the county for delinquent taxes in which the city has an interest, nor the condition of the fund generally. It will be noticed that the amended complaint in order to comply with the Court's former decision, alleges the condition of the indebtedness fund, or rather purports to set forth such condition, for even this amended complaint is faulty in not alleging the amount of cash on hand, although this is admitted in

the bill of exceptions, and Judge Hanford in his memorandum decision overruling defendant's demurrer to the amended complaint uses this language:

"The allegations of the amended complaint are sufficiently explicit to show that there is a large amount of indebtedness to be provided for; that the available funds added to taxes levied and not collected, are inadequate and that the city has neglected to levy additional taxes and it is a legal conclusion that the city is derelict and subject to coercive process by a writ of mandamus."

3 and 4. These assignments of error call in question the amount of the judgment, and also assign as error the fact that the Court rendered an unconditional money judgment against the city.

The warrants in suit, if valid, are payable out of a special fund. This fund is limited. The agreement for the warrants to be drawn on this fund, consisting of a resolution of the city council making a proposition and offer and an acceptance of said offer by the judgment creditors, (Record, pp. 144, 145 and 146), after the law creating the said fund went into effect, limited the warrant holders to payment out of this fund.

By the judgment of the lower court this limited liability has been converted into a general liability. There is nothing to show on the face of the judgment that the whole amount of the judgment may not be recovered at once, whereas the only object for which the suit is prosecuted, and the only object for which

it can be prosecuted, according to this court's former ruling, is to get a judgment for the basis of a writ of mandamus to compel the city council to make a levy for the Indebtedness Fund.

The eight and ninth findings, record, pp. 112-113, show that there are outstanding and unpaid forty-seven warrants of the series of which plaintiff's warrants are a part, that stand for payment before plaintiff's warrants. These findings show that the lowest number of plaintiff's warrants involved in this suit is 49, and that warrants 3 to 48, both inclusive, are outstanding and unpaid. According to law these forty-six warrants must be paid before plaintiff's warrants are paid. The stipulation of facts contained in the bill of exceptions at page 147 of the record, shows the face value of each of these warrants, and by addition the total face value appears to be $19,639.03.

Section 3947 of Rem. & Bal. Code of Washington reads as follows:

"All county, school, city and town warrants shall be paid according to their number, date and issue, and shall draw interest from and after their presentation to the proper treasurer: *Provided, that no compound interest shall be paid directly or indirectly on any of said warrants.*"

Under this section these prior warrants drawn on the indebtedness fund do not lose their priority by virtue of plaintiff's judgment, or by virtue of

plaintiff's action to compel payment, whatever may be the outcome of said action.

"But when a judgment is recovered against the municipality on a warrant, the judgment as a general rule does not alter or destroy the priority of the holder of the warrant, or of the holders of other warrants on the fund." 2 Dill. Mun. Corp. § 854, 5th ed.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548 (556-7)

Especially is this so under the laws of Washington, where no action is allowed on a municipal warrant except a mandamus proceeding to compel the proper officers to make the levy to provide the fund from which warrants are paid. Under this rule there could be no such thing as figuring the interest on a warrant to the day of judgment, and then interest on interest till the same is paid. The rule in Washington does not work out that way, and even if it would, the law expressly forbids it.

The judgment should be complete on its face and express the rights of the parties, and these rights should not be left to subsequent litigation over what the record outside of the judgment shows.

The judgment bears interest from date at the rate provided by law. This is equivalent to compounding the interest on the warrants at the date of the judgment, which is prohibited by the proviso in the above section 3947 of Rem. & Bal., the proviso

being "Provided, that no compound interest shall be paid directly or indirectly on any of said warrants."

Under this head may also be noticed the fourteenth finding set out in full in the fourth assignment of error. It will be noticed that this finding states the aggregate amount of the principal of the warrants and states from what time the interest is to be calculated, and further states that there is due such an amount together with interest thereon at a certain rate, six per cent, part of it from one and part of it from another date. The finding does not state however, that it is payable, but simply that it is due. If it was the intention of the Court to say that such amounts were due and payable at that time, then such finding is not supported either by the evidence or even by the pleadings. The proper interpretation of the finding is that the Court simply intended to express an indebtment of the city on the warrants to the amount therein mentioned, and if this is the case, then the judgment is not supported by the findings as to the amount, for the amount of the judgment is what it would be if the Court had found that such amount is due and payable at that time. This error will more particularly appear in the discussion of the next assignment of error, or rather the ground upon which the error is based will more particularly appear.

The 18th finding, states the aggregate amount of the warrants in suit together with the date from which they bear interest. If as stated before, the Court

intended to find that these warrants are due and payable at that time, then the judgment would be supported by this find in this particular respct, but the finding would not be supported either by the pleadings or by the evidence in the case and it would be a violation of this statute. On the other hand, as stated before, if the Court simply intended to find the amount of the warrants in suit, and not that such warrants are payable at that time, then the judgment as to the amount is not supported by the findings.

We must presume that the Court meant no violation of this state statute. The plaintiff is entitled to no greater rights so far as the amount that he is to receive is concerned, than he would be entitled to in a court of the State. Its rights arise by virtue of the laws of the state, and this court will simply enforce those laws in its own way, but it is entitled to no more for its warrants than it would be if payment were enforced in a court of the state by mandamus.

In the case of the *Portland Savings Bank vs. Montesano,* 14 Wash. 570, this question was before the Court. The Court granted a writ of mandamus requiring the city to exchange electric light warrants for general fund warrants, and the contention of the appellant was that the Court should have allowed interest on the electric light warrants up to the time of the exchange and ordered warrants on the general fund for the amount of such electric light warrants,

including interest. In answer to this contention the Court says:

The first claim of the appellant is that the Court should have allowed interest upon the amount found due as interest upon the electric light warrants. If this had been done the appellant would have been in a better position than he would have been in if the warrants had been drawn on the general fund in the first instance. But there was nothing in the case that tended to show that such warrants were of greater force than those drawn upon the general fund. Interest upon general fund warrants could not be compounded; and for that reason the warrants issued in place of the electric light warrants were rightfully so drawn that when paid they would amount to no more than the amount for which the electric light warrants were drawn with simple interest thereon" (p. 571).

If this judgment is allowed to stand, the city will have to pay interest on the interest that is included in this judgment from the date of judgment till paid at the rate of six per cent per annum. By reference to the fact value of the warrants in suit, it apepars that $15,025.89 of the face of the judgment is interest, and hence the city will have to pay interest on interest in round numbers on fifteen thousand dollars or nine hundred dollars annually.

5. The Court erred in overruling the demurrer to the amended complaint, the said demurrer having been interposed on two grounds: 1. On the ground that the amended complaint does not state sufficient facts to constitute a cause of action. 2. On the ground

that the said action has not been commenced within the time required by law.

Under the first ground of demurrer, we wish to call the Court's attention to the fact that no demand has been alleged in the amended complaint. The purpose of this suit is to compel the city council to make a levy for the indebtedness fund, and a demand should have been made, alleged and proved, on the city council to make the levy. The only demand alleged in the amended complaint is the demand on the city treasurer for the payment of the warrants in suit (Record, pp. 5 and 14).

The memorandum decision overruling the demurrer uses the following language: The argument in support of the demurrer appears to be based upon the single proposition that the case is not ripe for proceeding to obtain a writ of mandamus because the amended complaint fails to allege that the city has refused to make an additional levy of taxes after demand." It is the opinion of the Court that this point is not well taken. It is true that the case is not ripe for the issuance of a mandamus, but in the legal order of proceedure, the plaintiff should obtain a judgment, previous to making a demand, to be followed by an application for a mandamus."

The Court seems to have been of opinion that no demand for a levy is necessary till after judgment. But this court laid down the rule that the plaintiff

must allege facts which would entitle it to a writ of mandamus in a state court.

13 Ency. Pl. & Pr. 617, lays down the rule as follows:

"The supreme court of the United States has declared the rule imperative, that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and that it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred."

We have heretofore shown that the findings of fact do not sustain the judgment because they do not show the condition of the indebtedness fund. The amended complaint and the memorandum decision recognize the fact that it is necessary under the decision of this court in this case and of the Washington supreme court to show this condition, but the amended complaint fails to show such condition by failing to show the amount of cash on hand.

This complaint then is defective in failing to allege a refusal after demand and in failing to show the condition of the indebtedness fund by failing to show the amount of cash in it. In the case of *State ex rel. American Etc. Co. vs. Mutty,* 39 Wash. 624, in speaking of the duty of the city council in making

a levy for the Indebtedness Fund, the supreme court says:

"It is manifest that the council should not only take into consideration the amount of outstanding and unpaid indebtedness, but also consider it with reference to the means which have already been provided for payment, by way of cash on hand, and of previously levied and uncollected taxes."

6. The second ground of demurrer, the statute of limitations, has also been raised by answer, and this assignment will be discussed and argued on the facts as shown by the pleadings and evidence.

It is true as a general proposition of law that a municipal warrant in the State of Washington will not outlaw until six years after there has been notice given that there is money in the treasury to pay it. But this is nothing more than saying that the statute of limitations will not begin to run against a municipal warrant until a cause of action arises upon it. In the case of *Union Savings Bank vs. Gelbach,* 8 Wash. 497, the Court says:

"Now a warrant, under our statutes, is a promise to pay it, in its order of issue, when money applicable to it comes into the treasury; and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest."

In the case of *Potter vs. New Whatcom,* 20 Wash. 589, the Court says in relation to the same subject: "In the case at bar, manifestly the statute of limita-

tions could not begin to run until there was money in the treasury applicable to the payment of the warrants, and the holder of the warrants had such notice as would enable him to present them to the treasurer for payment."

In the case of *Cloud vs. Town of Sumas,* 9 Wash. 399, the supreme court of the State decided that no action can be maintained on a city warrant, but that the warrant holder's remedy is by mandamus to compel payment or a levy. This decision has been upheld by the subsequent decision in Washington, and this court has followed such decisions in this case as well as the case of *The Pauly Jail Building and Manufacturing Co. vs. Jefferson County,* 160 Fed. 866, so far as to allow no action on such warrant except on a showing sufficient in a court of the state that would entitle the plaintiff to a writ of mandamus.

In the case of *Quaker City National Bank vs. Tacoma, 27* Wash. 259, the Court had under consideration an action against the city for collecting money belonging to a special assessment fund on which plaintiff's warrant was drawn and diverting it from such fund. The Court decided that a cause of action against the city in such a case outlawed in three years, thus showing that there is nothing in the nature of a warrant which makes it invulnerable against the plea that the statute of limitations has run against it.

The logical conclusion from all these decisions is simply this, that the statute of limitations will begin to run against any cause of action based on a city warrant, the moment the cause of action arises, just the same as on any other instrument. Ordinarily the statute does not begin to run against it because no cause of action has arisen on it. We know of no case where the Court has held that a city warrant can be sued on during any part of a period longer than the appropriate statute of limitations.

This argument is directed principally against the possible contention that a cause of action has arisen on these warrants in any event, and that it is not necessary to show such action to take into consideration anything except the fact that there is a large amount of this indebtedness outstanding, that the city council has never made what might be called a substantial levy for this fund in view of the large amount of indebtedness existing and the levy that they are authorized to levy by law, and that no payments have been made on the same. The same allegations that would show a cause of action when this cause was commenced without taking specifically into consideration those matters which the state court says must be alleged and proved to entitle the warrant holder to a writ of mandamus, would also show that such cause of action existed in favor of the warrant holder after the city council had failed or neglected to make a substantial

levy at the first opportunity they had to do so, which according to the laws of Washington, would have been on the first Monday in October, 1898, the time that the levies are made for the different funds.

7. The seventh assignment of error involves the question whether the warrants in suit were ordered at and adjourned regular meeting of the council.

We ask the indulgence of this court and permit us to argue this point again, although it would appear that in the case of *Intermela vs. Perkins,* 205 Fed. 603, this identical point was decided against the contention of the defendant.

There are three reasons that induce us to present this point again to this court: In the first place, there is a distinction between this case and the Intermela case so far as the record is concerned. This court speaking through Judge Wolverton in the Intermela case uses the following language with reference to the meeting held on February 15, 1898: "In the present case the council met at a regular meeting, and finding itself unable to complete or transact the business in hand, took a recess, so termed, until the next day, and in like manner took another recess to another day, at which time the business in hand was completed, and the council adjourned."

It seems that the Court drew the conclusion from the record that there was so much business that the

council could not complete the same in one evening at the regular meeting without adjournment and had to postpone a part of the business till the next day. In order to bring the matter before this court clearly we have shown by the evidence in this case that this meeting held on the fifteenth of February was really a short meeting, that it was not because there was so much business at this meeting that it could not all be transacted, but because the council was not yet ready to act. (Testimony of August Duddenhausen, record, p. 169.)

In the second place, there is a Washington decision made since that time that will have a bearing on the question in case the Court should finally come to the conclusion that the meeting of February 17th was an adjourned regular meeting, and would be inclined to consider the matter not of sufficient importance to invalidate the warrants. The decision referred to is *Seymour vs. Ellensburg,* 81 Wash., 365, holding to a strict compliance of the statute with reference to the issuing and form of warrants.

In the third place, with due respect to the Court's former decision, we will ask the Court to consider this point again. The idea that the meeting of February 17th was an "adjourned regular meeting" within the meaning of the statute, or still worse for the plaintiff, an adjourned meeting of an "adjourned regular

meeting" appeals so strongly to reason that it is difficult to overcome it.

In the Stipulation of Facts, the following appears on page 143-4 of the record: "At said regular meeting under the head of "New Business" the clerk read notice of attorneys in street grade warrant cases. After the reading of such notice and the transaction of other business the city council took an *adjournment* of the meeting till three o'clock P. M. of the next day, without stating so far as the minutes of said meeting show, the object or purpose of the *adjournment.* The The council met in pursuance of said *adjournment* when all the members were again present. At said *adjourned meeting* the said council discussed the matter of paying the street grade warrants * * *. After such discussion, the following resolution was passed by the city council, and it then *adjourned* to the next day."

The statute governing the meetings of the City Council reads as follows: "The city council together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general election, shall take the oath of office, and shall hold regular meetings at least once each month, but not to exceed one regular meeting each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor, by written notice delivered to each member at least three hours before the time

specified for the proposed meeting: *Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed, at such special meeting, or at any adjourned regular or special meeting.* All meetings of the city council shall be held within the corporate limits of the city at such place as may be designated by ordinance, and shall be public."

Dillon on Municipal Corporations lays down the following as to the powers of a municipal corporation:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensible * * *. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. *Much less can any power be exercised, or act done, which is forbidden by charter or statute.*" 1 Dill. Mun. Corp. §239, 5th ed.

How strictly the State of Washington construes the powers of municipal corporations is shown by a decision which as we have noticed before came out after the case of *Intermela vs. Perkins* was decided, the case of *Seymour vs. Ellensburg,* 81 Wash. 365.

In this case the question before the Court was whether the city of Ellensburg had exceeded its one-

and one-half per cent debt limit without a vote of the people. If certain electric light warrants that had been issued and unpaid, were valid, then the city had exceeded its limit, whereas if such warrants were not valid, the city had not exceeded its one and one-half per cent limit. The following law, §7687, Rem. & Bal. was in force at the time the warrants were issued:

"All demands against such city shall be presented to and audited by the city council, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand, the mayor shall draw a warrant upon the treasurer for the same, which warrant shall be countersigned by the clerk, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

The electric light warrants in question were drawn according to this law in every respect except that they did not show on their face for what purpose they were drawn. The Court held them invalid, and said: "If warrants which do not specify the purpose are nevertheless valid, then any other requirement of the statute as to what the warrant shall contain might be omitted, and the statute practically nullified," p. 390.

This case is similar in principle to the one before us, only it is not so strong. Only a positive requirement of the statute was disregarded in the Ellensburg case. In the case before us, the council did that which they were expressly prohibited from doing. To refer to the rule laid down by Dillon, cited above: "All acts beyond the scope of the powers granted are void.

Much less can any power be exercised, or any act done, which is forbidden by charter or statute."

This argument proceeded so far on the supposition that the meeting at which this agreement was entered into and the warrants ordered was an "adjourned regular meeting." We have been unable to find a decision on any statute that is like ours. The Court's former decision was to the effect that the meeting held on February 17th was not an adjourned regular meeting.

The statute contains a prohibition against doing certain things at "an adjourned regular, or special meeting." This statute has a purpose and that purpose should be carefully noted by the Court. It is not at all infrequent to require acts which lead to the creation of an indebtedness to be preformed in a cerain way and to be surrounded with certain safe guards. For instance in the case of *Union Bank of Richmond vs. Commissioners of Oxford,* 119 N. C., 214; 34 *L. R. A.* 487, a case that will be discussed hereafter for another purpose, the Court decided that a certain act of the legislature involved in the case was sufficient as a railroad charter, but not sufficient to authorize a city to create an indebtedness, because the constitution provided that acts giving authority to create an indebtedness must be passed in a certain way and the legislative journals must show certain things. This is only an instance. We find many instances where consti-

tutions safeguard laws authorizing the creation of indebtedness, and also many instances where statutes contain special requirements in the regard to the manner of disbursing public funds, and the statute just cited and set out at length is simply another instance. Nothing unusual. It would, it seems, be wholly illogical, to say that the meeting of February 16th was an adjourned regular meeting, but that the meeting held on February 17th was not within the prohibition of the statute. The law uses the words "adjourned regular or special meeting," after prohibiting the matters referred to from being done at the special meetings therein provided for. The language of the statute is: "at such meeting, or at any adjourned regular or special meeting."

It will be no answer to the contention that the meetings held on the 16th and 17th were continuations of the meeting held on the 15th. All adjourned meetings are continuations of the meetings from which an adjournment is taken. That is the general idea of an adjourned meeting. In fact the language of the statute clearly indicates that or rather says so in so many words. There are two kinds of adjourned meetings spoken of: Adjourned Regular Meeting and Adjourned Special Meeting. An adjourned regular meeting can be nothing more nor less than a meeting resulting from an adjournment or a regular meeting; an adjourned special meeting can be nothing more or less than a meeting

resulting from an adjournment taken from a special meeting. An adjourned regular meeting is a continuation of the regular meeting and therefore we call it "an adjourned regular meeting." An adjourned special meeting is a continuation of the special meeting, and therefore we call it an adjourned special meeting. Now the statute comes in and says that certain things shall not be done at such adjourned regular or special meeting.

Dillon on Mun. Corp. §535, 5th Ed. uses the following language with reference to "Adjournment of Meetings."

A regular meeting, *unless special provision is made to the contrary*, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or of a by-law, or the established or general usage, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished; but might, if the adjournment was general, do any act which might lawfully have been done had no adjournment taken place."

In a note to this section it is stated: "Where a charter requires that an ordinance shall not be passed

unless it is introduced at a previous meeting of the council, it cannot be passed at an adjourned meeting. An adjourned meeting is a continuation of the same meeting. *Staats vs. Washington,* 44 N. J. L. 605, 611."

We are citing these authorities to show that an adjourned meeting is a continuation of the meeting from which the adjournment is taken; that the statute under consideration must be taken to use the expression "adjourned regular meeting" in its interpreted meaning, and that the inhibition in the statute is against doing certain acts at such adjourned meeting notwithstanding the fact that the adjourned meeting is a continuation of the meeting which has been adjourned.

It will also be noticed that Dillon in stating what may and what may not be done at an adjourned meeting is careful in each instance to qualify his statement to the effect that if no provision is made to the contrary.

It has not been questioned before and we take it for granted that it will not be question now, that the acts done by the council on the 17th of February come within the acts prohibited by this statute. The language of the statute is: Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed,

at such special meeting, or at an adjourned regular or special meeting."

If what the city council did at these adjourned regular meetings was legal, it consisted of a proposition made by the council to the judgment creditors to compromise their judgments, and an acceptance by the judgment creditors of such proposition, and then these orders, warrants, for the payment of money issued. They not only entered into a contract, but also issued orders for the payment of money.

8. This assignment involves the legality of the judgments in part satisfaction of which the warrants in suit were issued, and as the defendant contends that these judgments were obtained in fraud of the taxpayers, it incidentally involves the question whether the court rightfully made the 14th finding of fact, which was duly excepted to (Record, p. 123, 24th exception), in which the Court found that there was no fraud or collusion or acquiesence in the payment of an unlawful claim.

The first question that arises will be the question whether the Court in this action can for any reason go back of the judgments and consider the cause of action upon which such judgments were based, or whether these judgments must be taken as *res judicata* and invulnerable against any attack whatever at this time.

The first question that naturally presents itself is whether this is a direct or a collateral attack. The supreme court of Colorado in the case of *Kavanagh vs. Hamilton,* 53 Colo. 157, 125 Pac. 512, recites what are direct attacks upon judgments, as follows:

1. By Motion; 2. By Answer and Cross-Complaint; 3. By Equitable action to cancel or enjoin its enforcement; 4. By Writ of Error; 5. By Writ of Review.

Defendant has attacked these judgments by answer in an action brought to enforce them. In the case of *State ex rel. American etc. Co. vs. Tanner,* 45 Wash. 348, the supreme court of the state lays down the rule that judgments may be directly attacked by answer in an action brought to enforce them, and that such answer takes the place of a bill in equity, and that such a defense may be interposed at any time the action to enforce is brought, that is, that the defense will not outlaw as long as the cause of action to enforce it remains. The judgments in the Tanner case were declared the result of fraud and collusion, were declared a fraud against the taxpayers, and the warrants issued in satisfaction thereof were likewise declared fraudulent and void. Yet the only thing from which the Court drew this conclusion of fraud was that the city council allowed these judgments to be taken against it by default in pursuance of an agree-

ment on a cause of action upon which the supreme court of the state had said the city is not liable.

In the case of *State ex rel. Bradway vs. De Mattos,* 88 Wash. 35, the supreme court held the judgment involved in the case void, the judgment having been based partly on street grade warrants and partly on what may have been a legitimate claim against the city. The judgment was entered by consent. The attack was made by answer in a mandamus proceeding to compel the city of Bellingham to levy a tax to pay the warrants issued in satisfaction of such judgment. This case is similar to the Tanner case in the 45 Wash. 348, except that in the latter case the judgment was alleged to have been taken by default in pursuance of agreement.

In the State of Washington, equitable defenses are allowed in actions at law, and the courts statement in the Tanner case that such answer takes the place of a bill in equity will raise the question whether in this Court, such answer will be considered in an action at law.

It will not be necessary to try to determine to what class of attacks the attack made in this case belongs. It seems that in most of the cases in which attacks on judgments have been allowed, they have not been classified, and it appears that not all could be reconciled with the rule usually laid down as to the inviolability of a judgment of a Court of com-

petent jurisdiction, where the Court has jurisdiction of the person and of the subject matter. So that the decided cases will be discussed without any attempt at classification. It seems also, that in some of the decided cases, such attacks on judgments have been allowed, because to do otherwise would have worked a great injustice and the courts have found a legal and approved way to avoid such injustice, without reference to any particular class of attacks, under which such decisions may be justified.

Ever since the decision in the case of the *German American Savings Bank vs. Spokane,* 17 Wash. 315, decided on July 9, 1897, no case has been decided in the state of Washington where a recovery was allowed on street grade warrants as such, and as far as our search goes, no judgment obtained on such street grade warrants that has ever come before the Court has been allowed to stand against an attack. The Supreme Court in the Tanner case, 45 Wash. 348, decided January 15, 1907, in speaking of this question, after citing numerous cases in Washington, says:

"Few principles seem to be better established by the decisions of this Court, if repeated decisions shall be taken as emphasizing the law upon a given subject, than that the general taxpayers of a city shall not be made liable for the class of indebtedness sought to be enforced here. The reasons are set forth in the decisions and need not be repeated here."

Since then numerous other decisions have been added to this line and it is not necessary to cite any

further decisions, because in the state of Washington, so far as state decisions go, the question is no longer in dispute.

If this Court will hold the city liable in this case it will be the only city in the state as appears from the decisions that will be so held liable. The supreme court of the state so far has declared that the city is not liable in the cases that have already been decided.

The adjudicated cases will now be examined to see if there is not some legitimate and well recognized reason for going back of these judgments involved in this case and to consider the cause of action upon which they are based.

In the first place, it will be necessary to examine the facts and circumstances surrounding the granting of these judgments with special reference to this particular assignment of error.

Up to the time the case of the *German American Savings Bank vs. Spokane* was decided on July 9, 1897, it may be admitted that the defense of the street grade warrant cases then pending was bona fide. It is difficult to believe, however, that such was the case after this decision came out. The trial or pretended trial of the eight cases occurred on December 18, 1897. There is positive testimony that at least the legal department of the city and the attorneys for the warrant holders knew of this decision in the

fall of 1897 and winter of 1898. But even without this testimony, which we do not wish to urge strongly upon the Court, the Court is justified in assuming that the city officials did know and that the attorneys of the street grade warrant holders did know.

The eight cases apparently contested were all tried in one day (Exhibit 1, record p. 195). Over one hundred exhibits were introduced in the first five cases tried, according to the record (Exhibit 1, record p. 195 *et seq.*) and each of the other three cases was noted as being the same as one of the others there designated (same exhibit). Notwithstanding the complicated record, judgment in favor of the plaintiff in all the cases was announced immediately after the trial. The record does not show any arguments of counsel, that is, exhibit 1, referred to does not show such argument. The rendering of these judgments at this time is difficult to explain, unless after the exhibits were all introduced or may be before; there was a consent on the part of the city attorney to the granting of the judgments.

On the 19th of January, 1898, findings in four of these cases were signed by the Court and on the 20th the findings in the four other cases were signed by the Court, but none of them were filed with the clerk till February 1st following. The judgment in four of these cases were likewise signed on January 19th but not filed with the clerk till February 1st fol-

lowing. The judgments in the four other cases were signed and filed with the clerk on February 5th.

After these judgments were so taken and before they were paid and before the time for appeal had expired, the city council took the advice of Mr. A. R. Coleman, in practice as an attorney for over forty years, and at that time the most prominent attorney of Port Townsend. He advised them that they had a good defense to the said actions, and his advice was so given after a few days consideration of the question in which time he examined the Spokane case. He advised them that they could defeat all of the cases on appeal. Notwithstanding this advice the city council ordered the judgments paid, and issued Indebtedness Fund warrants in order to do so. (Mr. Coleman's testimony, record p. 163.)

In this connection we wish to ask the Court to take judicial notice of the fact that all important cases are appealed to the supreme court, especially in the state of Washington, and that a payment of such judgments as these under the circumstances surrounding these cases without appeal even though the said judgments amounted to only a tithe of these judgments, would argue a special case. But add to this, the fact that these judgments together amounted to over sixty-seven thousand dollars, when the whole constitutional debt limit was in round numbers only seventy-five thousand dollars, it is difficult to escape

the conclusion that there must have been something in these cases that does not appear on the face of the record, and that the Court could at least draw the conclusion of fraud against the taxpayers, even though the Court should find that there was no fraudulent intent on the part of the officers of the city in paying these judgments.

If it appears then that these judgments must have been entered by consent on the part of the city officers, according to the authorities, the city may go back of them and show that they are based on a claim upon which the city was not liable.

State ex rel. Bradway vs. De Mattos, 88 Wash. 35.
State ex rel. American etc. Co. vs. Tanner, 45 Wash. 348.
Kelly vs. Milan, 127 U. S. 139; 32 L. Ed. 77.
Union Bank of Richmond vs. Commissioners of Oxford, 119 N. S. 214; 34 L. R. A. 487.

In the De Mattos case, the first one cited above, the Court analyzes the case and then states the questions involved in the following language:

"The answers to two questions must be determinative of this case upon the merits. (1) Were the several judgments, in partial payment of which the warrants here in question were issued, illegal and void because of the inclusion therein, and in the agreement upon which they were based, of street grade warrants for which the city officials had no power to assume on behalf of the city a general liability. (2) Can we go behind the judgments themselves to determine the facts which would avoid the judgments,

or are the judgments *res judicata* as to every defense which might have been raised in the original suits against the city of Fairhaven?" p. 41.

In this case a consent judgment against the city was involved, and such judgment by consent included street grade warrants as a cause of action together with legitimate claims against the city. The Court held the whole judgment void and said:

"Unless precluded by the principles of *res judicata* from looking beyond the face of the judgments, we are constrained to hold that these judgments were void because the consideration of the compromise was inextricably mixed with an illegal element, in that, as a part of the compromise, the city officials assumed on behalf of the city payments which they had no power to assume, by including in the compromise warrants upon which there could be no bona fide claim that the city was liable, hence not a legal subject of compromise. *State ex rel. American Freehold-Land Mortgage Co. vs. Tanner,* 45 Wash. 348, 88 Pac. 321." p. 43.

Again the Court says: "The Court found and so do we, that the city officials in making the settlement were actuated by no bad motive. The Court also found and so do we, that they so far exceeded their powers as to taint the settlement and judgments with constructive fraud. This, though less reprehensible, can be no less fatal than actual fraud." p. 44.

The Court continues on the same page: "The appellant strenuously insists that, when it is sought to enforce a consent judgment, the Court can look no further than the allegations of the complaint in the action in which it is entered, and if it states any cause of action, the inquiry is concluded; that a consent judgment, like other judgments, is *res judicata* of everything which might have been litigated in the action had it been contested. That might be true

where no fraud, either in fact or law, is alleged in the answer as entering into the settlement on which the consent judgment was founded. Such at least, is the rule touching mere default judgments founded on no agreement to suffer default or other actual consent (*Harshman vs. Knox County,* 122 U. S. 306), or where on a trial a defense is not made which might have been made (*Smith vs. Ormsby,* 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110). But where, as here, such fraud is alleged as a defense against the enforcement of the judgment, that defense is equivalent to a direct attack on the judgment, and as such throws the whole settlement open to inquiry, and when, as here, it appears that there was an element entering as a recognized consideration into the settlement which could not on any sort of complaint have been a valid element in a cause of action because neither a legal nor a moral liability on the city's part, and where it further appears that this fact must have been known at the time of compromise, as in this case it must have been by reason of the prior decisions of this Court, then the settlement is tainted with fraud in law and the judgment by consent thereon is void. Such is the necessary result of the holding of this Court in *State ex rel. American Freehold-Land Mortgage Co. vs. Tanner, supra.* The appellant concedes that such would be the result if actual fraud be proved by clear and convincing evidence, but we know of no rule which marks any difference in this regard between actual fraud and constructive fraud."

The other cases cited above and many more that might be cited, sustain this idea that a judgment rendered by consent against the city, where the city officers had no authority to bind the city on the cause of action upon which the judgment is based, does not bind the taxpayers, the real principals, and the city can afterwards in an action to enforce such judgments go behind the judgments and show that the

judgments are based on a claim on which the city is not and cannot be held liable.

On the other hand, if the Court concludes that the record in the cases in which the street grade warrant judgments were rendered show that such judgments were not consent judgments, and that this record has not been overcome by competent proof, or that no evidence can be received for the purpose of contradicting this record, or in other words if the Court concludes that the street grade warrant judgments were not consent judgments, we still have good authority to go behind these judgments and show that they are based on no claim on which the city can be held liable.

We cannot expect to find cases that are exactly like the one before the Court. Our complex civilization gives rise to new questions daily, and courts will not refuse to administer justice in any particular case, because no adjudicated case can be found exactly similar to the one before the Court.

In the case of *Ward vs. Joslin,* 186 U. S. 142, 46 L. Ed. 1093, a stockholder was permitted to go behind the judgment against the corporation and show a want of power in the corporation to make the contract on which the judgment was based. This was done under a law and in a jurisdiction where judgments against the corporations on valid claims were held conclusive against the stockholder.

The law under which this decision was made reads as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The judgment on which the stockholder was sought to be held liable was obtained on a guaranty by the bank. The stockholder was allowed to show that the corporation had no authority or power to enter into the particular guaranty, although it was evident that the corporation could guaranty such paper if negotiated in the transaction of its legitimate business; that the guaranty was not made in the course of transacting its business as a corporation, and that the particular case was not one falling within the exception in favor of railroad corporations and corporations for religious or charitable purposes.

The law under which the corporation was organized contained the following provision:

"No corporation created under the provisions of this act shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its incorporation."

In the course of the decision, Chief Justice Fuller said:

"Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires*,

it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas constitution. *Hancock National Bank vs. Farnum*, 176 U. S. 640, 44 L. Ed. 619, 20 Sup. Ct. Rep. 506. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforcible against him when rendered against the corporation on a contract beyond its power to make."

To like effect is the case of *Schrader vs. Manufacturer's Nat. Bank,* 133 U. S. 67, 33 L. Ed. 564. In noticing this case in the opinion in the case of *Ward vs. Joslin, supra,* Chief Justice Fuller says: "In *Schrader vs. Manufacturer's Nat. Bank,* * * *, it was ruled, that although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, 'that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business;' and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation 'was not binding on the stockholders in the sense that it could not be re-examined'." p. 1099.

In case of the *Union Bank of Richmond vs. Commissioners of Oxford,* 119 N. C., 34 L. R. A. 487, the Court had under consideration the question whether it could go back of a consent judgment and hold certain railroad aid bonds invalid. The action was a mandamus proceeding to compel the levy of a tax to pay the bonds. The case arose as follows:

The town of Oxford on a proposition submitted, voted to subscribe $40,000 to the stock of a railroad company. Afterwards the town refused to issue the bonds and a suit was brought compelling it to do so. While the suit was pending a compromise was entered into between the town and the railroad company and a judgment was drawn requiring the issuance of $20,000 of the bonds. The bonds were issued and delivered to the railroad company and afterwards purchased by the plaintiff in the case. Afterwards the town refused to recognize the validity of the bonds and this action was brought to compel it to do so.

The case was before the supreme court of the state twice. On the first trial below the plaintiff was non-suited on the ground that the charter of the town did not authorize the election under which the $40,000 bonds were voted. The supreme court set this non-suit aside and agreed with the lower court that the charter of the town did not authorize the election, but at the same time held that the law chartering the railroad company on its face did authorize the election, and hence the non-suit was set aside and the case was sent back for trial.

When the second trial was had below, the point was made for the first time that the act chartering the railroad, which the supreme court held authorized the election, while good as a railroad charter, was invalid under the constitution as an act authorizing the

creation of an indebtedness on the part of the town, the same not having been passed in the manner providing for the passage of acts authorizing cities to create indebtedness.

The question considered and decided by the Court was whether it could go back of the consent judgment and examine into the validity of the bonds and also whether the former decision of the supreme court setting aside the non-suit would not prevent the Court on this appeal from considering such question.

This is an important case for the position taken by the defendant in this action, not only on the question whether this Court can go back of the street grade warrant judgments and consider the cause of action on which such judgments are based, but also on the question as to the effect the fact has, that the case of the *Bank of British Columbia vs. Port Townsend,* had already been to the supreme court of the state, and that Court had held, incidentally, at least, that the second amended complaint states a cause of action.

The Court goes into the validity of the statute chartering the railroad company as an act authorizing the town to create the indebtedness, and concludes that the act was good as a railroad charter, but was not good as an act authorizing the town to create an indebtedness, because not passed as required by the constitution for the passage of such acts. The Court also decided that it could go back of the consent judg-

ment and their own decision setting the non-suit aside, and consider the validity of the bonds; that the bonds are invalid, and that the plaintiff is not entitled to the writ of mandamus.

The Court cites many cases to show that a consent judgment, where the consent is given by parties in their representative capacity, is not *res judicata,* where such parties did not have the power to do that which they consented the Court should do in granting the consent judgment. After quoting at length from the case of *Brownsville Taxing District vs. Loague*, 129 U. S. 493, considering this a similar case, the Court says: "So even in the present case, even if the former judgment had not been by consent, it appears that there was no authority to issue the bonds, and the Court will not issue a mandamus to levy a tax to pay such judgment."

This clearly shows that while the Court was considering a consent judgment, it did not base its opinion on such fact.

In the case of *Brownsville vs. Loague*, 129 U. S. 493, 32 L. Ed. 780, the record does not show whether the judgments had been taken by consent, by default, or after contest. No importance is attached to it. They were based on interest coupons. Chief Justice Fuller in closing the decision emphasizes the lack of a cause of action in the following language:

"*Res judicata* may render straight that which is crooked and black that which is white. *Facit ex curvo rectum, ex albo nigrum; Jeter vs. Hewit,* 63 U. S., 22 How. 352 (16:345, 348); but where application is made to collect judgments by process not contained in themselves, and requiring to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the Court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgment, but that they rest upon no cause of action whatever."

The record in this case shows that the judgments sought to be enforced rest upon claims which the supreme court had definitely announced before such judgments were taken, and many times since, are not a liability against the city. In other words they are based on no cause of action whatever, and it is not necessary to go outside of the record to show the lack of a cause of action.

Of the warrants involved in this suit, those numbered, respectively, 116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145 and 146, were each issued payable to the Bank of British Columbia, in part satisfaction of the judgment obtained by said bank against the city as heretofore set forth. This case, it will be noticed, is one of those that had been in the supreme court of the state. The lower court sustained the city's demurrer to the second amended complaint, and after the plaintiff refused to plead further, the case was dismissed, and from this judg-

ment of dismissal the plaintiff appealed to the supreme court. The supreme court reversed the lower court and held that the complaint, second amended complaint, states a cause of action. The opinion of the Court was written on February 11, 1897, about five months before the case of the *German American Savings Bank vs. Spokane,* 17 Wash. 315, was decided; this last case being the one in which it was definitely decided that cities in Washington are not liable on street grade warrants, and in which the Court really recalls or overrules all decisions in conflict with it. In the Spokane case, the Court notices the case of the *Bank of British Columbia vs. Port Townsend* in the following language:

"In *Bank of British Columbia vs. Port Townsend,* 16 Wash. 450 (47 Pac. 896), while it was *in effect* held that an action would lie against the city where there was a failure to provide the fund, there was no discussion of that question. The case was disposed of on a demurrer to the complaint. Although the complaint alleged that the right to prosecute the assessment was lost, no importance was attached to it. *In fact the mooted questions were other than that as the opinion shows,* and it was held that the complaint stated a cause of action, and it was also held that, unless the contract was authorized by an ordinance there could be no recovery."

Later on in the same opinion, p. 342, it was stated that the Bank of British Columbia case should have no force or should be no authority, "except in so far as sustaining the complaint in the Port Townsend

case alluded to may have incidentally held it as the law of that case, * * *.

In the case of *Union Bank of Richmond vs. Commissioners of Oxford*, 119 N. C. 214, 34 L. R. A. 487, *supra*, the supreme court of North Carolina had taken the position on the first appeal that under a certain act of the legislature, the town had authority to issue the bonds in question. On the second appeal the defense was made that the said act was not passed as required by the constitution for the passage of laws authorizing towns to create indebtedness, and this defense was held good and the bonds declared invalid.

The principle is the same. In the Bank of British Columbia case, certain points were discussed and the second amended complaint, so far as those points were concerned, was decided to state a cause of action, but this should not close inquiry, or rather would not have closed inquiry into other defects of the same complaints, had the case gone to the supreme court a second time, and after a trial on the merits, unless "the law of the case" theory is applied with such strictness that, if followed in the North Carolina case would have put the Court in the absurd position of lending its aid in enforcing an unconstitutional statute, and in the Bank of British Columbia case, on a second appeal would have compelled the supreme court of the state to give judgment against the city on a claim which it had declared no liability against the city.

Moreover, there is good authority to the effect that after a case is sent back for trial or re-trial by an appellate court, the whole case is open for decision according to law as interpreted at that time. This is the rule in the state of Nebraska.

In the case of *Hastings vs. Foxworthy,* 45 Neb. 676; 34 L. R. A. 321, the Court considering this subject says: "Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the Court, and the case in such a situation that by the correction of its error no injustice will be done, beyond perhaps, the creation of additional costs? If the doctrine contended for is to prevail here, then it follows that the only instance in which the Court is not permitted to correct its mistakes or refuses to do so, is also the only instance where the mistake can be corrected without injustice."

Again the Court says in conclusion: "The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the Court to examine its former decisions, and apply the law correctly. We think that ordinarily the Court is justified in refusing to re-examine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous that this should be. It is however, clearly established that the former opinions in this case were erroneous, and the Court should correct the error."

In addition to the cases already cited, we wish to cite the following as cases where the Court went behind the judgment and based its decision on the cause of action on which the judgment was based.

Grauham v. Mayor of San Jose, 24 Cal. 585;
Kane v. Rock Rapids Ind. School Dist. 82;
State ex rel. Sunnerfield v. Taylor, 14 Wash. 495;
Kelly v. Milan, 127 U. S. 139;
Canal Bank v. Partee, 99 U. S. 329;
Windsor v. McNeigh, 93 U. S. 274;
Bigelow v. Walker, 109 U. S. 258;
Love v. Blauw, 48 L. R. A. 257 (Kan.);
In re Permstick, 3 Wash. 672.

Some of the cases in Washington holding cities not liable on street grade warrants of the kind and character on which the street grade warrant judgments involved in this case are based are as follows:

German American Savings Bank v. Spokane, 17 Wash. 315;
Wilson v. Aberdeen, 19 Wash. 89;
Rhode Island Mortgage etc. Co. v. Spokane, 19 Wash. 617;
Doxy v. Port Townsend, 21 Wash. 707;
Northwestern Lumber Co. v. Aberdeen, 22 Wash. 404;
Potter v. Whatcom, 25 Wash. 207;
State ex rel. Security etc. Soc. v. Moss, 44 Wash. 91;
Soule v. Ocosta, 49 Wash. 518;
Jurey v. Seattle, 50 Wash. 272;
State ex rel. American etc. Mortgage Co. v. Tanner, 45 Wash. 348;
State ex rel. Bradway v. De Maltos, 88 Wash. 35.

9. *Constitutional Debt Limit*

In the charter of the city of Port Townsend in force at the time the street improvements were made and the street grade warrants issued, there were two methods provided for making street improvements.

Section 7 of the act, laws 1881, p. 115, gives the city general power to improve streets and to collect a poll tax and also a general property tax for the purpose. Section 8 gives the city power to open up and improve streets by the special assessment plan. The two methods are distinct and it will not be denied that all the street improvements in payment of which the street grade warrants which formed the basis of the judgments involved in this suit, were all made by the special assessment plan.

When these warrants were originally issued they were not a liability against the city. They were issued in payment of the contract price of the improvements and were to be paid out of a special fund, and their issue to whatever amount could not be said to create a liability against the city and they were not to be taken into consideration in calculating the indebtedness of a city.

Baker vs. Seattle, 2 Wash. 576—approved by numerous cases decided subsequently.

A large number of improvements under this plan were made and street grade warrants in payment thereof were issued to such an extent that at the time the judgments in controversy here were taken there were outstanding warrants amounting to nearly $130,000. The assessed valuation at this time, years 1897-8, of the city was, in round numbers $1,500,000. Five

per cent of the assessed valuation, the constitutional debt limit would be $75,000. In other words the street grade warrants outstanding at the time these judgments were taken amounted to about one and two-thirds times the amount allowed by the constitution not taking into consideration the other indebtedness of the city which it is admitted was at the time already over the constitutional debt limit.

As the supreme court has decided that cities of the state are not liable at all on such street grade warrants, the Court naturally has never decided when the defense that the city is indebted beyond its constitutional debt limit should be interposed to a claim against the city on such warrants, nor has it decided at what time the indebtedness should be figured, whether at the time the street grading contract was entered into, or the time of issuing the warrants, or the time the claim is made against the city and reduced to judgment.

The complaint in the case of Manchester Savings Bank as set out in defendant's answer, paragraph 17 of the complaint Record, p. 67), alleges generally that at the time the improvement was made the indebtedness of the city did not amount to one and one-half per cent of the assessed valuation including the said warrants. Incidentally it maybe said that the warrants sued on in the Manchester Savings Bank case were issued February 11, 1889 (Record, p. 63), and the contract for

the improvement in payment of which the said warrants were issued was made October 15, 1888 (Record, p. 69), before the admission of Washington into the union as a state and when the character provisions of the City of Port Townsend were in force, in which it is provided that the indebtedness of the city shall never in the aggregate amount to more than five thousand dollars; sec. 24, laws of 1881, page 122. The warrants sued on, even their face value amounted to more than five thousand dollars. The findings of the Court follow this allegation and it is another instance to show what sort of a pretense the defense in these cases was.

In the decision in the *German-American Savings Bank vs. Spokane,* 17 Wash. 315 (320), the subject of the limitation of indebtedness is discussed and the Court says:

The first two cases (*Baker vs. Seattle,* 2 Wash. 576; *Soule vs. Seattle,* 6 Wash. 315), held that indebtedness of that character (street grade warrant indebtedness) was not a general indebtedness and that the constitutional limitation did not apply. If such claims can subsequently become a general liability against municipalities, serious complications are likely to arise, for in some instances the debt limit would undoubtedly be reached before all such claims are provided for, and there might be some question as to which of them should be entitled to priority. If the

contract in terms purported to bind the city generally and was lawfully entered into, the question should be determined with reference to the financial condition when such contract was made (*West vs. Chehalis,* 12 Wash. 369, 41 Pac. 171, 50 Am. St. Rep. 896); and the priority of the respective times of execution would be controlling in determining the question as between the various contracts, where only a part of them could be made a charge within the debt limit. Where the contract contained no such provision in that respect, and the right is founded on a breach of the contract in failing to provide the fund, a different question arises and it must decided with reference to the time either when the delinquency arose or when it should be judicially determined. Unless the latter time governs, there might be some question as to when the responsibility for the unreasonable delay becomes fixed, especially considering the fact that the city could not bind itself to provide the fund in a certain time, or in the shortest possible time as has been sometimes attempted. *Stephens vs. Spokane,* 14 Wash. 298."

This then leaves the matter in doubt, but this decision strongly leans toward the view that the indebtedness should be considered with reference to the time it may be judicially determined that the city is liable. In so viewing the matter, the indebtedness of the city should have been figured with reference to the time it was judicially determined that the city was

liable, and this would again have freed the city and would have made the whole street grade warrant indebtedness void, even if otherwise it would have been a valid debt against the city. Of course it will be answered that the judgments determined this and overruled any such defense even if it had been interposed. But the record shows that the question of the indebtedness of the city at the time suit was brought or at the time the judgments were taken was not considered at all.

We have seen, however, that according to the decisions of the following cases: *State ex rel. etc. Mortgage Co. vs. Tanner,* 45 Wash. 348; *Kelly vs. Milan,* 127 U. S. 139; *Union Bank of Richmond vs. Commissioners of Oxford,* 34 L. R. A. 487, 119 N. C. 214, that a consent judgment or decree settles nothing when the consenting party acts in a representative capacity and has no power, we might say, from the principal to do the thing he consents to. We contend that the record shows that the city council in their representative capacity of agents of the taxpayers consented to these judgments, and that consequently it could settle nothing except what they had authority to do as given to them by the laws of the state.

It is admitted that during the years 1897 and 1898, the city was indebted beyond its constitutional debt limit, and also that the indebtedness represented by the street grade warrant judgments and by the

Indebtedness Fund warrants had never received the assent of three-fifths of the voters.

10. The City can make the same defense against the plaintiff in this action as it could against the payees to whom the Indebtedness Fund Warrants were originally issued.

Union Savings Bank N *Trust & Trust Co. v. Gelbach,* 8 Wash. 497;
Bardsley v. Sternberg, 17 Wash. 243;
West Philadelphia Title & Trust Co. v. Olympia, 19 Wash. 150;
State ex rel. Olmpia Nat. Bank v. Lewis, 62 Wash. 26;
University State Bank v. Bremerton, 86 Wash. 261.

From these authorities it will clearly appear that cases involving negotiable bonds and interest coupons must be carefully distinguished from this case.

11. In the interpretation of the laws of a state the United States Courts will follow the decision of the State Courts. The case of *Green v. Neal,* 6 Pet. 291, is very similar to the case before this Court. It involved the statute of limitations in an action concerning real estate. The Supreme Court of the United States had interpreted a statute of limitations of Tennessee and had decided a second case on the authority of the first at a time when the interpretation of the statute had not been considered definitely settled, although the statute had been before the State Court a number of times. Finally, in a certain case in the State Court,

the statute was interpreted and such interpretation consistently followed thereafter, and the United States Supreme Court overruled its former decisions and followed the State Court.

The Supreme Court after citing many cases showing that it has been the practice of such Court to follow the decisions of State Courts, say:

"Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the state tribunals, respectively in the construction of their statutes. That this has been done as a matter of principle, in all cases where the decision of a state court has become a rule of property."

"In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the states. The rights of the parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule and it regulates all the transactions which come within its scope."

Green v. Neal's Lessee, 6 Pet. 119, 123.

Bausman v. Blunt, 147 U. S. 652, 37 Fed. 316, is to the same effect and involved the statute of limitations on a promissory note.

Both these decisions involved the statute of limitations in which the decisions of the State Court are followed strictly by the United States Courts. But decisions on other local laws are likewise followed. Municipal corporations of a state are the creatures of the statutes of the state and an interpretation of their

powers, though it may be an interpretation of many statutes instead of one, are still an interpretation of local laws, and the United States Court will follow the decisions of the State Courts.

Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 51 Fed. 1057. (This case involved the powers of a private corporation.')

Board of Commissioners, Wilkes Co. v. W. N. Coler & Co., 180 U. S. 506, 45 Fed. 642. (Rights of holders of county bonds.)

Respectfully submitted,

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No. 2833

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY COLORADO,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error in behalf of the Defendant below to the United States District Court for the Northern Division of the Western District of Washington

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STATEMENT OF THE CASE.

This cause is a part of a controversy waged now for some years between the City of Port Townsend and holders of sundry 'Indebtedness Fund Warrants' out of 158 warrants, aggregating in face value $67,483.47, issued on February 18, 1898, in liquidation of nine judgments of the Superior (or

trial) Court of the State there sitting, and then recently entered. All were issued pursuant to a resolution and order of the City Council, passed on February 16, 1898; each was marked with the words 'Indebtedness Fund,' and the brief title of the judgment in part payment of which that warrant was issued; and their serial numbers ran from 2 to 159. The judgment creditors were all different and unconnected persons; but the essential facts touching the merits of the controversy and of all the pending suits are either identical or parallel as to each warrant. Those facts have been before this court as to warrant No. 2, in

Intermela vs. Perkins, 205 Fed. 603;

and the record in this cause adds but little (and in our view that little unimportant) to the evidence there before the court.

This same cause was also before this court on a writ of error from a judgment of the then Circuit Court dismissing the complaint on a general demurrer; and the opinion of this court is reported in

First National Bank vs. City of Port Townsend, 184 Fed. 574.

The judgment below was affirmed on the ground that the complaint must show such a dereliction of duty by the city's officers to take the necessary steps

for providing the means to pay the warrants as to justify a writ of mandamus to levy a tax for the purpose.

The plaintiff was allowed to amend the complaint, and thereafter the cause proceeded to trial, and to judgment for the plaintiff in the sum of $28,978.69, on January 31, 1916. (Transcript, 125.)

The action was brought upon sixteen 'Indebtedness Fund' warrants of the city issued to the Bank of British Columbia, a British corporation, and fourteen others of the same series issued to the Manchester Savings Bank, a New Hampshire corporation, in part payment of judgments of the Superior Court of Washington in favor of the respective payees, which warrants aggregated $13,-950.80, with legal interest from February 18, 1898, and were later bought by the plaintiff. The complaint also avers that only a trifling amount of city debt entitled to be paid from the indebtedness fund prior to the warrants of said series remained unpaid; that the city from 1898 to 1908 had levied for the indebtedness fund from one-tenth of a mill to two mills on the assessed valuations—the statute requiring a levy of six mills when needed, but had made no later levy for said fund; and that the city had assets in the form of taxes collected and uncollected, and of proceeds of sales of land for taxes,

which are applicable to warrants of said series. (Transcript, 2-22.)

The answer pleads *verbatim* the complaints in the actions by said two payees in the State court in which the judgments were entered, to show that those judgments originated in street improvement warrants, which were not primarily city liabilities; that the State Supreme Court, before these judgments were rendered, had decided that special street assessments or warrants did not constitute city debts; that the city council knew that fact, and was guilty of fraud in allowing those suits to pass to judgment; that the State court was without jurisdiction to enter those judgments; that the city was then indebted beyond its constitutional limit, and there had been no popular vote to validate the 'Indebtedness Fund' warrants; that all the warrants Nos. 2 to 159 of that series had been ordered by the city council at an adjourned meeting, and not at a regular meeting, of that body, as required by law; and that this action was not begun within the time required by law. (Transcript, 25-84.)

The reply as amended denied that the ruling of the State Supreme Court was to the effect pleaded in the answer; denied that the warrants were ordered at an adjourned meeting; denied the defenses

of fraud, lack of jurisdiction and outlawry of the debt; and pleaded estoppel of record by the judgments for which the warrants were issued, and in particular by the decisions and judgments of the State Supreme Court in four cases (of which the Bank of British Columbia case was one) among said nine cases, which had gone up on appeal from dismissals on demurrers to the complaints, and on reversal had come back to the trial court and judgments for the plaintiffs had there been entered, which were four of the very judgments that were paid by the warrants. (Transcript, 84-91.)

A 'stipulation of facts' (Transcript, 137-161) contains most of the evidence pertinent to the issues. It shows the following facts:

The judgments in favor of the Bank of British Columbia and the Manchester Savings Bank were based on street grade warrants, which had been issued some years previously, pursuant to contracts made by the city with contractors, under ordinances directing street improvements at the expense of abutting property, and authorizing contracts therefor and the issue of special warrants to pay the contractors. These warrants were chargeable by their terms to a designated 'Street Improvement Fund'; and the city guaranteed their payment with

ten per cent interest, but there was no ordinance or resolution that the city should guarantee payment. The city failed to collect more than a small part of the special warrants from the property assessed, and after some years said two banks sued the city on those which they had acquired, as did also some other holders of like warrants. The result was a series of nine judgments drawing ten per cent interest, which are listed on page 144 of the Transcript. Numerous exhibits, including ordinances, contracts and warrants were filed in all of these cases (Transcript, 195-201), findings upon the issues of fact and law were signed by the judge, and in at least some of them defense was made by demurrer or answer. (See Transcript, 89, 93, 94, 138, 139, 192.) That was the case as to the two judgments in favor of said two banks—the plaintiffs' assignors of these warrants. Those actions, as shown by the complaints copied into the answer of the defendant herein (Transcript, 27-46, 47-68), were brought for the recovery of damages for breaches of the city's implied contracts in failing to collect the warrants from the property assessed, and in allowing the time for collection to lapse. Shortly after the entry of these judgments, negotiations between the city and the judgment creditors were opened—apparently induced by a demand for payment—and resulted in

an agreement to pay the judgments in full by six per cent warrants on the 'Indebtedness Fund.' (Transcript, 142-145.) The city charter required orders for payment of claims to be passed at regular, and not at adjourned, meetings; and the regular meetings were fixed by ordinance on the first and third Tuesdays of each month. The minutes of the regular meeting on February 15, 1898, are set out on pages 188-192 of the Transcript. All seven councilmen, the mayor, clerk, attorney and marshal were present. After disposing of other business, the clerk read a notice from the attorneys of the judgment creditors and without action on it the council took a recess to 3 p. m. of the next day. On that day, all the members were again present, the subject of the judgments was discussed, and the council formulated a resolution reciting that in its opinion these judgments were just and legal obligations, and ordering them to be paid, in 'Indebtedness Fund' warrants, with six per cent interest, on condition that all the judgment creditors, as therein listed, were to accept the offer by 3 p. m. of the next day, February 17th. Then another recess was taken to that hour and date, at which the judgment creditors formally in writing accepted the offer; and the warrants were all drawn and issued on the succeeding day. (Transcript, 142-153.)

Testimony in an attempt to support the defense of fraud was presented by the plaintiff in error, as follows:

A. R. Coleman, of many years' residence, in the practice of law, at Port Townsend, testified: He was consulted by members of the city council before the issue of the 'Indebtedness Fund' warrants. He examined the records of the judgments to advise the councilmen. The mayor and several councilmen asked him to advise them, not as at a meeting of the council, but as members of it, whether they should appeal from the judgments, or pay them. He examined the case of *German-American Bank vs. City of Spokane,* 17 Wash. 315, and gave them his opinion on the strength of it that the judgments could be reversed. The city attorney was not present. The mayor and councilmen said he had advised them to pay, but they lacked confidence in him and wanted Mr. Coleman's advice, privately. He named, at their request, the fee he would charge for an appeal; they paid for his advice, but declined to employ him to appeal. (Transcript, 162-166.)

George Anderson, the city clerk since 1906, produced the book of minutes of council meetings; and the minutes of February 15, 16 and 17, 1898, were inspected by the court. The minutes of the meeting of February 15th occupied two and one-half pages

and 'would be a short council meeting.' Under plaintiff's objection he was not allowed to testify to the average length of council meetings, nor how the meetings in 1898 compared in length with those of the present. The city has done nothing as to providing for payment of the warrants. It is his business to prepare statements of the city's liabilities, but in making the tax levies the city council does not take into consideration these 'Indebtedness Fund' warrants. (Transcript, 166-168.)

August Duddenhausen was city clerk in February, 1898. The minutes for February 15th were written by him and covered not quite two and a half pages. He could not remember whether that meeting was long or short; there were attorneys in Port Townsend from elsewhere, representing the creditors, and the council and the mayor tried to get the best conditions from them and for that reason the meetings were adjourned; they were not ready to take final action. Under plaintiff's objection as immaterial, he said that judging from the minutes and his recollection, that was rather a short meeting, probably lasting an hour and a half. The meetings then were usually about two hours and a half. On the morning of that day he was told that the councilmen and mayor would come to his office, but because it was small, they went into the treas-

urer's office and he asked whether he should go along. He was told he could, but need not take any minutes. It was not a regular council meeting. Five or six councilmen and the mayor were present and Mr. Coleman gave his advice. When they crossed the hall, Mr. Plumley, the city attorney, asked him if it was an official council meeting and he replied that it was not and Mr. Plumley then said that if so, he would not be present. (Objected to by plaintiff as a private conversation between the clerk and the attorney.) The mayor said in the treasurer's room that he did not want Mr. Plumley; that he had no confidence in him and that was the reason he engaged Mr. Coleman.

Cross-examination: The length of the minutes has some relation to the length of the meeting, but not always. When there was a debate over a motion he did not put down the debate in the minutes. Simply that the motion was made and whether carried or not. The pages in the minutes nearly indicate the length of the meeting unless there was something particular in the contents to explain why they would not agree. He could not judge from the length of the minutes at any one meeting absolutely whether it was a long or a short meeting.

(Transcript, 168-172.)

J. J. Bishop, county clerk, produced the court minute book, which showed entries in eight of the nine cases in which judgments were taken against the city (being all except the case of Alonzo Elliott, which had previously gone to judgment); these entries show filings of sundry exhibits and were all made under the date of December 18, 1897. (Exhibit 1, Transcript, 195-202.) (Objected to by plaintiff as immaterial and because the proceedings were merged in the judgments.) He had none of the files with him. The amended answer and reply in said case of *Manchester Savings Bank vs. City of Port Townsend* were introduced under the same objection. (Transcript, 181-188.)

U. D. Gnagey, said he was chief counsel for the defendant and had been city attorney for several years; the case of *German-American Savings Bank vs. City of Spokane,* 17 Wash. 315, decided on June 6, 1897, was generally known and discussed among some of the lawyers of Port Townsend at the time when these suits were brought against the city. It was known to Mr. Felger, who was one of the attorneys for the Manchester Savings Bank, and also to Mr. Plumley, the city attorney. He would not say it was discussed before the city council. (Transcript, 173-174.)

No evidence was offered in support of the defense that the statute of limitations had run against the warrants.

It was admitted by the defense that the case of *Bank of British Columbia vs. Port Townsend* was the same case that went to the Supreme Court previously and was reported in 16 Wash. 460. Upon objection to the relevancy of the fact because it was not pleaded, the plaintiff was allowed to amend its reply, which amendment is found at page 86-90 of the Transcript. The same is the fact as to three others of the nine judgments, all reported in 16 Wash., pp. 701-702.

The stipulation shows (pp. 154-155) the levies for the 'Indebtedness Fund,' 1888-1898, under Chapter 84 of the Session Laws of 1897, which enacts in Section 3 (Sess. Ls. 1897, p. 222) that every municipal corporation under 20,000 population shall levy and collect an annual tax for current expenses not over ten mills and 'a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar * * * and all moneys collected from the taxes levied for payment of indebtedness shall be credited and applied to a fund to be designated as "Indebtedness Fund" '. The aggregate amount realized from the levies for the 'Indebtedness Fund' from 1888 to 1898, inclusive, was

$12,351.01. (Transcript, 155.) The Legislature having enacted by said Chapter 84 of 1897 that all proceeds of taxes of 1896 and previous years should be paid into the 'Indebtedness Fund,' it appears by the list on page 156 of the Transcript that the amounts which had been realized in and after 1898 from tax rolls of previous years was $44,642.67; but all of this money appears to have been exhausted in payment of charges against the 'Indebtedness Fund' prior to the series of warrants issued to pay for these judgments. (Transcript 160, 176-180.)

Warrants Nos. 1 and 160 did not concern any of these cases and both have been paid. The city treasurer under orders by the council had transferred on his books $3,797.60 in three separate sums from the 'Indebtedness Fund' to the 'Current Expense' fund and at the time of the trial $527.07 stood on the treasurer's books to the credit of that fund. (Transcript, 156-157.) The city council has not ordered any levy for the 'Indebtedness Fund' since 1908 and by the passage of its ordinance No. 722 (Transcript, 161) the treasurer was required to pay no 'Indebtedness Fund' warrant excepting the 'General Expense', 'Fire and Water', 'Light' and 'Road' fund warrants. Accordingly, the city clerk testified that 'in making the city tax levies, the city council did not take into consideration these "In-

debtedness Fund'' warrants.' (Transcript, 168.)

The district judge made findings of fact and conclusions of law (Transcript, 109-116), in brief that the warrants in suit were issued in part payment of judgments of the Superior Court of Wash. ington for Jefferson County in favor of the payees after appearance by the defendant and on evidence; that the judgments bore interest at ten per cent; that the city council unanimously decided to pay those judgments and did so by the six per cent 'Indebtedness Fund' warrants; that they were ordered at a regular meeting of the council duly held and after deliberation; that they were purchased by the plaintiff in 1898 at a then fair market value in the ordinary course of business, without notice of any intention of the defendant to contest them; that there was no fraud or collusion in the payment of an unlawful claim; that the defendant has levied taxes as above stated, for the 'Indebtedness Fund,' but has made no levy since 1908; that the city has paid up its outstanding indebtedness prior in rank to the warrants serially numbered 2 to 159, but has transferred from the 'Indebtedness Fund' and used for other purposes other sums; that no call for any warrants has been issued nor have any been paid except Nos. 1, 2 and 160, and that the amount due on the warrants in suit was $13,952.80, with interest.

From these facts he drew the conclusions that the warrants were valid and subsisting liabilities; that the defendant was estopped by the judgments in liquidation of which the warrants were issued from relying on any defenses which might have been pleaded to those actions, including the defenses that the city was not liable on the causes of action sued on in said former actions and was already indebted beyond its constitutional limit; and that it was the defendant's duty to levy a proper tax, in the amount of six mills on the dollar, for the 'Indebtedness Fund' during every year beginning with 1898, and to apply the proceeds to their proper use, according to law until the warrants in suit were paid. Accordingly, a judgment was entered against the defendant for $28,978.69 as the indebtedness due to the plaintiff upon the warrants in suit 'and that the plaintiff have process of this court in its favor against the defendant for the collection of said indebtedness and costs, according to law and the practice of the court.' (Transcript, 126-126.)

The district judge filed an opinion in which he carefully considered the pleadings and evidence in this case and also in an equity case between the same parties, which is not now before this court, and in which he came to the conclusion that none of the defenses is valid. (Transcript, 204-216.)

ARGUMENT.

The defendant has assigned nine errors and argued them under eleven numbered heads. But in summary form this writ of error really involves only two questions:

(1) Are the warrants in suit, and is the judgment, a valid debt of the defendant?

(2) If so, has the city yet become derelict in its duty to pay its debt?

In other words, first, is there a lawful debt, and second, is the city now bound to pay it by a tax levy?

On the first question we might well rely upon the doctrine of *stare decisis. Intermela vs. Perkins,* 205 Fed. 603, was a thorough consideration by this court of the same subject on almost identical issues and with almost identical evidence. After the opinion was announced there was an elaborate petition for rehearing; the petition was denied, and a petition for a writ of *certiorari* was presented to the Supreme Court. Briefs in support and in opposition to it were filed and the petition was denied, without an opinion.

Intermela vs. Perkins, 231 U. S. 757.

That case involved, as we have said, nearly identical issues. There was a technical defense which does not occur here, that the jurisdictional amount was lacking. That defense was overruled and thus the court was brought to the merits of the cause. On the merits, the same defenses were made in nearly the same language as in this case, except the defense of fraud. But that defense was practically raised and argued before the lower court and in the briefs here; and the same evidence, as the record shows, bearing on that defense, was before the court, except the oral testimony presented herein. Of that, more later. Therefore, we say, that we and this court might well stand on the doctrine of *stare decisis.* For courts are not inclined, after thorough consideration of the facts and the law of a controversy in one case which really involves the merits of large liabilities of the same defendant to other parties not before the court, and when that consideration has been had by three successive courts from the lowest to the highest, to disrupt the harmony and continuity of their decisions, which are so essential to any settled system of justice. There is no need to labor the point. It is bred into the bone of every lawyer and every judge.

Nevertheless, since the defendant is not content to accept one decision of this court as settling the law of these liabilities, we will, without waiving our reliance upon the doctrine of *stare decisis,* now proceed to discuss the defendant's points in the order in which they are stated in its brief.

I.

HAS THE PLAINTIFF A GOOD TITLE AT LAW TO THE WARRANTS?

The objection to our recovery that the warrants are insufficiently or improperly indorsed is purely technical. The court can see by inspection that they were indorsed by their payees. But even that was unnecessary. Title to negotiable or non-negotiable paper, even such as is payable to order, may be proved by evidence of actual delivery, payment of the price, and present possession by the person suing on it. Mr. Lake, the cashier of the plaintiff since August, 1904, testified that the bank's books show that the warrants in suit were purchased in the ordinary course of banking business, and for cash, in March, June and July, 1898, and had been assets of the bank, on its books as such, ever since then. He gave a list of them, which agrees with those produced by the plaintiff's attorney at the trial and filed as exhibits, and said on cross-examina-

tion that no one else 'had any interest in the warrants and the bank is the absolute owner of them'.

(Deposition of H. H. Lake, Transcript, 134-136.)

These warrants are non-negotiable in the sense that the transferee does not take them free of any defenses which might be made against them in the transferor's hands; and they are payable to order. But even such paper can be transferred and good title to it made by actual delivery, in the absence of a contrary statute.

Ashworth vs. Crockett, 11 Mo. 636.

Hill vs. Alexander (Kans.), 41 Pac. 1066.

With paper payable to order, the law merchant requires other evidence of transfer than mere delivery; and such evidence we have here.

Redmond vs. Stansbury, 24 Mich. 445.

Crisman vs. Swisher, 28 N. J. L. 149.

Instead of a statute to the contrary in Washington, the Uniform Negotiable Instruments Law, in force there, declares:

> 'Where the holder of an instrument pay-
> 'able to his order transfers it for value without
> 'indorsing it, the transfer *vests in the transferee*
> *'such title as the transferor had therein*, and the

'transferee acquires, in addition, the right to 'have the indorsement of the transferor. But 'for the purpose of determining whether the 'transferee is a holder in due course, the ne- 'gotiation takes effect as of the time when the 'indorsement is actually made.'

Remington's Codes of Washington, 1915, § 3440.

Obviously the last sentence has no application here, because the rules about 'due course' have no bearing on non-negotiable instruments. Since they are open to defenses, whenever acquired, 'due course' is immaterial. Therefore we have all the title that the payees had, whether the indorsement is technically complete or not; and that suffices to maintain the suit.

We must keep clearly in mind the distinction between indorsement as a means of increasing the holder's security by charging the indorser and by showing acquisition in due course free of defenses, and indorsement as a mere means of proving title in the holder. As the former, it is vital; as the latter, it is a convenience, but not a necessity.

Huntington vs. Lombard, 22 Wash. 202.

Thomson-Houston Elec. Co. vs. Capitol Elec. Co., 56 Fed. 849.

II.

HAS THE PLAINTIFF SHOWN THE DEFENDANT TO BE DERELICT IN ITS DUTY TO PAY ITS DEBTS, SO THAT IT IS SUBJECT TO A WRIT OF MANDAMUS?

As we have said already, two main questions cover all the minor points: Is the city indebted to us? And has it yet failed in its duty to pay its debt? Logically, the first question precedes; but since the defendant's counsel have chosen the reverse order, we must assume till later that the city is lawfully indebted to us on these warrants.

Coke says, 'Execution is the end of the law.' Actual and peremptory enforcement of the judgment: that is true of every court, of whatever jurisdiction, under whatever sovereign. Methods and processes vary; the end of all is the same: payment or performance. The statutes of Washington provide that a city's debts shall be paid only by warrants, and that where the debt is a judgment, it too must be paid by warrants, on filing a satisfaction of the judgment. The warrant is merely a serial voucher of the accounting officer, and is to be converted into cash presently or later, as the city treasury is in funds. There can be no writ of execution, no *fieri facias,* against a city.

Sess. Ls. 1869, p. 154, Sec. 604;

Remington's Codes (1915), Sec. 953;

Sess. Ls. 1890, p. 186, Sec. 119;

Remington's Codes (1915), Sec. 7671-19.

(The citations to 'Remington's Codes', which is the latest and best compilation, are duplicates of the session laws, and are given for convenience of reference. The session laws show that the law was as we state it before the warrants were issued.)

If judgments are to be turned into warrants, and the warrants in turn are to be put in suit, as a note of an individual is, there would be an endless chain. Therefore the state courts hold that an action at law on a city warrant does not lie, but the proper method to enforce the warrant is to seek a writ of mandamus; and before it issues the city can both (a) contest the merits of the claim, and (b) dispute its present duty to pay it.

On the other hand, the federal courts, deriving their jurisdiction from another sovereign, hold that they cannot be bound by state statutes and court practice; and hence they entertain actions at law against cities on their warrants, but require the holder to prove not only the debt, but the city's delinquency in paying it.

The decisions on mandamus to a city council to levy a tax for a city debt are only special applications of the fundamental principle of the whole law of mandamus: that the writ is not issued to enforce a discretionary duty, a duty only to exercise one's own judgment, at his own choice of time, means and manner, but it is issued to compel prompt discharge of a duty to do a definite act presently. And that comes about through the peculiarity of municipal corporate finance: that the city's debt is not presently due and collectible till it either has the cash in hand or the means and power to procure the cash. Municipal corporations are limited in the subject-matter, purposes and amounts of the debts they may incur; and after incurring them in the rate at which they can pay them. The private corporation must pay present debts even to the whole of its capital, or go to the wall. Not so the city; it has only the power in any one year to levy on its taxpayers a few cents or a few mills on the dollar to pay a given class of debts. In that sense, then, a city's debt is not due—that is, *collectible*—till it either has the means to pay it, or the power to get the means.

These very simple ideas lie at the bottom of all municipal finance and of the law of municipal indebtedness. And since the whole law of contracts

is based on the idea that honest debts are to be paid, there is a natural presumption that a city ought to exercise its power to the legal limit to pay its debts. Hence the courts should not strain technical rules to enable the city to avoid or procrastinate payment. And all the decisions on mandamus to a city council really imply this; they only require a plain, present duty to be brought definitely home to the council.

This court in its decision on the first writ of error in this cause, 184 Fed. 574, held, following

> *State ex rel. Am., etc., Mortgage Co. vs. Mutty,* 39 Wash. 624,

that the plaintiff must prove more than a mere failure to levy a tax to the legal limit—six mills; it must prove a dereliction of duty by the city officers. Accordingly, the complaint was amended, and facts were proved which, we believe, show a gross dereliction of duty.

Let us look for a moment at that case in the 39th Wash.

That, too, was a case against Port Townsend, on indebtedness fund warrants. It was brought in 1909. The city council had levied only one mill for the indebtedness fund. The petition for the writ

only showed that the warrants were unpaid; the relator had demanded a six mill levy, which was refused; the city for some years had not made a full levy, and even that would not pay his warrant, in view of the prior outstanding warrants and the city's assessed valuation; but it did not show what other resources than the levy the city had. It sought a writ to compel an additional five mills levy.

The state court held, on demurrer to the alternative writ, that the showing was insufficient, because the statute of 1897 (ch. 84, Sess. Ls. 1897) provided for the establishment of two funds—indebtedness, and current expense—as distinct funds, with a separate limit of tax levy for each, abolishing all preexisting funds, and for the payment into the indebtedness fund of all receipts after February 1, 1898, from taxes of 1896 and previous years. Such receipts and the uncollected taxes from levies for that fund since 1897 therefore were assets of the fund, and the city council was to take into consideration the amount of the outstanding warrants and also said assets of the fund—of the amount of which there was no showing—and hence it had a lawful discretion to exercise in the matter, which could not be controlled by mandamus; and the presumption was it had levied year by year enough.

That decision then was based on the very narrow ground of a debatable discretion of the council to levy a six mill tax, and on the rather violent presumption that a levy of one mill on $930,946 valuation sufficed with some old taxes that had run over eight years to keep up with a warrant indebtedness of $125,000. It held that there was no duty to make additional levies until those already made had proved ineffectual.

Now for the facts in this present record. First, then, we summarize here for the court's convenience, and as the fundamental fact of the situation, Chapter 84 of the session laws of 1897, because it abolished the prior plan of municipal finance, set up a new plan, and by a clear line of demarkation cut off the old method from the new. To make a clear slate and start even, it loaded all accumulations of prior debts on the indebtedness fund, and left the current expense fund to bear only after-accruing expenses.

> *State ex rel. Polson vs. Hardcastle,* 68 Wash. 548, 553.
>
> *Intermela vs. Perkins,* 205 Fed. 605, 607.

Ses. 1 creates in cities of under 20,000 population a 'current expense fund' and an 'indebtedness fund'.

Sec. 2 devotes to the 'current expense fund' all licenses.

Sec. 3 declares that cities shall levy annually a property tax of not over ten mills on the dollar for current expenses and ' tax for the payment of indebtedness *(if any indebtedness exists)* not exceeding six mills on the dollar'. All moneys collected from the levies for these funds 'shall be credited and applied by the treasurer to' them respectively.

Sec. 4 directs that the 'current expenses' levy shall be based upon an estimate of the expenses for the coming year, to be adopted by a majority vote of the council and in making the estimate the probable revenues from licenses and other sources, not taxes, shall be considered. 'Current expenses' shall include all expenses of carrying on the city government.

Sec. 5 directs that the indebtedness tax shall be baesd upon a statement of such indebtedness to be 'prepared by the clerk and approved by the council' when the levy is made and to be 'entered in the record of the proceedings of the council'. 'In making the levy consideration shall be taken of all outstanding warrants, certificates and all other obligations and indebtedness of the city with the interest thereon for the payment of which no pro-

vision is made by law, by the levy of a special tax, or otherwise than by a general tax'.

Sec. 6 passes to the 'current expense fund' all moneys to the credit of the street fund or the sewer fund over outstanding warrants.

Sec. 7 orders that all moneys collected on and after February 1, 1898, ~~and~~ from taxes of 1896 and previously and their penalty and interest, shall be paid into the indebtedness fund.

Sec. 8 requires that after February 1, 1898, all moneys payable into the general fund except taxes, shall be passed to the 'current expense fund'.

Sec. 9 says that after that date all current expenses shall be paid out of the 'current expense fund'.

Sec. 10 orders separate funds to be maintained by any city which owns water works or other public utility—which does not apply here.

Sec. 11 provides for the case of the extension of the city limits—which does not apply here.

Sec. 12 provides for the validation of public debt by any city consolidated with another.

Sec. 13 is the usual emergency clause.

Chapter 84, Session Laws 1897, pp. 222-225, approved March 16, 1897.

Second—the assets of the indebtedness fund:
(a) Taxes of prior years.

The city was incorporated by special charter in 1881. (Transcript, 28.) The taxes prior to 1898, paid after the statute of 1897 was passed, are stipulated to amount to $44,642.67. (Transcript, 156.) The defense also stipulated that the city treasurer collected the delinquent taxes for 1891-1894, inclusive, after February 1, 1898, when that law took effect; that the delinquent taxes for 1895 remaining unpaid were foreclosed in 1902, and when the tax-deed to the county was taken in 1903, the city taxes for 1895 then unpaid and represented in that deed were $3,450.12; and the unpaid taxes for 1896 were also foreclosed and when the tax-deed was taken in 1904, the city taxes for 1896 then unpaid were $4,284.79. (Transcript. 158-159.) Apparently these sums are not parts of the delinquent taxes tabulated on page 156 as collected from 1898 to 1904. We have, then, as the proceeds of taxes levied before 1897:

Taxes levied before 1895, collected 1898-1905	$44,642.67
Taxes levied in 1895 resulting in tax-deed, 1903	3,450.12
Taxes levied in 1896, resulting in tax-deed, 1904	4,284.79
Total	$52,377.58

(b) Levies after 1898, and other assets.

The aggregate of the levies for this fund from its creation in 1898 to 1908, inclusive, was 11.75 mills, or an average of almost $0.00107 per year, and the gross proceeds were $12,351.01, if every cent levied was collected. It does not appear that any of it remains unpaid. (Transcript, 155.)

The only remaining assets of this fund are $527.07 to its credit in the city treasury and the right (if that is an asset) to a return to that fund of $3,797.60, transferred from it in 1898, 1909 and 1910 to the sinking fund and the current expense fund by order of the council. (Transcript, 156-157.)

The indebtedness fund, then, has produced since its creation in 1898 these sums:

Taxes levied before and realized after 1897 (including tax-titles)	$52,377.58
Taxes levied after 1897	12,351.01
Total	$64,728.59

Of course the cash transferred to other funds and that now in hand were portions of this total and are not to be added to it.

Third—the disposition of these assets:

On February 1, 1898, when the new system began, there was out in face value of warrants on

the fire and water fund	$ 891.35
the road fund	2,016.27

the light fund	6,680.25
the general expense fund	31,150.70
Total	$40,738.57

There is, then, an apparent surplus of about $24,000 in the indebtedness fund over said old warrants which were prior to the warrants on that fund, and all of which it is agreed have been paid. (Transcript, 159-160.)

But certain deductions and allowances must be made. The resources of the indebtedness fund were not all converted into cash. The 1895 and 1896 unpaid taxes became tax-deed titles, representing $7,734.91, and it does not appear that the lands have been sold yet. There was switched by the council's orders, from that fund to other funds $3,797.60, and there is now in that fund $527.07. The face amounts only of the old warrants are given. Twenty per cent of their total or, say, $8,000.00, seems a reasonable estimate for the accrued interest on these warrants of unknown dates between 1881 and 1898, and which were paid off gradually after February 1, 1898, as cash came into the indebtedness fund from prior taxes (see Transcript, 156) and the meticulous levies of later years (Transcript, 155). We have, then,

Surplus of indebtedness fund		$24,000.00
Tax-titles	$ 7,734.91	
Transferred to other funds	3,797.60	
Cash in fund	527.07	
Estimated interest on old warrants	8,000.00	
Totals	$20,059.58	$24,000.00

The difference is accounted for approximately by the indebtedness fund warrants, Nos. 1 and 160, of small but unknown amounts, and the indebtedness fund warrant No. 2, $1,548.12, which resulted in the Perkins judgment for $2,933.84 and costs, on February 15, 1912, affirmed on writ of error in this court (205 Fed. 603) on May 5, 1913.

Fourth—the attitude of the city council:

The defense makes a hypocritical pretense of willingness to discharge its legal duty, but avers it has done all it was bound to do. Let us see.

The indebtedness fund has existed for nearly nineteen years. During that period the fund has had outstanding warrants on it to the total of $67,-483.47. The accrued interest is about 112 per cent,

an annual increment of	$ 4,049.01
and a total of, say	75,581.00
making an aggregate debt of, say	143,065.00

All this time, the city has had an assessed valuation averaging about $1,000,000.00. By a six mill levy it could have raised one year with another

$6,000.00 and thus have gained slowly on the debt. What has it done?

It has levied in nineteen years 11¾ mills, instead of eleven cents and four mills, as it might have done.

It has disobeyed the express mandate of the act of 1897 that it 'shall levy and collect annually * * * a tax for the payment of indebtedness *(if any indebtedness exists)* not exceeding six mills on the dollar'.

It has disobeyed the other mandate of the same act that 'in making the levy, consideration shall be taken of *all outstanding warrants,* certificates and all other obligations and indebtedness of the city, with the interest thereon, for the payment of which no provision is made by law, by the levy of a special tax or otherwise than by a general tax'. Sec. 5, Ch. 84, Sess. Ls. 1897. Its city clerk admitted that 'in making the tax levies the city council did not take into consideration these indebtedness fund warrants'.

(Deposition of George Anderson, Transcript, 168.)

It has further disobeyed another express mandate of the same statute that 'all moneys collected from the taxes levied for payment of indebtedness

shall be credited and applied to a fund to be designated as "indebtedness fund" '. Sec. 3. It is a dishonest trick and sham to let money go into the proper fund and then by a bookkeeping transfer use it for a foreign purpose.

It has substantially exhausted the resources of that fund, and then for eight years refused to make any levy for all that huge debt of the fund.

It has passed an ordinance which, in violation of the vested rights of creditors of that fund and in impairment of the obligation of the city's contracts, forbids the city treasurer to pay any 'indebtedness fund warrant except the "general expense", "fire and water", "light" and "road" fund warrants *without the special order of the city council'*. Sec. 9 of Ordinance No. 722, passed Sept. 4, 1906. (Transcript, 162.) No such 'special order' has ever been given. By holding up the treasurer on a call for such warrants, the council has both violated the obligation of the city's contract to pay when there is money in that fund, contrary to the state and the federal constitutions, ~~but~~ *and* it has made the treasurer violate his official duty and oath. For the law ever since 1895 (Ch. 152, Sess. Ls. 1895) has declared that 'whenever the treasurer of any * * * city * * * shall have in his hands as such treasurer the sum of

five hundred dollars, belonging to any fund upon which warrants are outstanding, *it shall be his duty* to make a call for such warrants to that amount in the order of their issue, and he shall' publish or post the call.

This duty is imperative and not dependent on the council's will.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548.

'If the legislature of the State cannot divert a fund to the detriment of a warrant holder (*Hardcastle* case, *supra*), much less can the city council do so, and that without any semblance of authority from the legislature.'

Intermela vs. Perkins, 205 Fed. 603, 608.

The city admits that warrant No. 3 stands next in order of payment, and that there was in the fund on April 28, 1915, $527.08. (Transcript, 157, 160, 161.)

There is therefore the highest presumption, if not positive certainty, that the city council has for years violated its duty to make immediate provision by levy for paying these warrants; that it has exhausted substantially all the resources of this fund except the right to levy, in paying large prior and

lawful charges on it and some which were not lawful charges on it; that it has exercised no genuine and honest 'discretion' as to the need of a levy, but simply and baldly repudiated the debt, and now in pursuance of dilatory tactics long pursued pretends that it is not shown to be derelict in the duty to levy, while its real contest is on the merits of the debt.

We have, then, a case for a writ of mandamus to the city council to

> 1. Order the treasurer to make a call and pay out $500.00 from the indebtedness fund;
> 2. Restore to this fund $3,797.60, wrongfully diverted to other funds;
> 3. Levy a six mill tax annually till our judgment shall be paid in full.

The findings are criticized as not showing the condition of the indebtedness fund. To which, there are two answers: (1) All the evidence at the trial is before the court, and it shows fully the state of the fund, as above discussed, so that whatever might be the case if the findings were here without the evidence, we have here the evidence to support the judgment; (2) the findings state the ultimate, not the evidenciary, facts, and show that the council has diverted money from the indebtedness fund and has not discharged its duty under the statute to levy the tax *'if any indebtedness exists'*.

If it is claimed that because the record fails to show what amount of delinquent taxes prior to 1891 still remains unpaid and how much has been collected since 1905 from the delinquent tax rolls of 1891-1897, and therefore that the city council presumably still has resources which it may apply without resorting to a levy, the sufficient answer is that a presumption of payment arises as to all taxes, real and personal, which remain unpaid after six years.

Graves vs. Stone, 76 Wash. 88,

Seymour vs. Ellensburg, 81 Wash. 365.

III and IV.

ARE THE FORM AND THE AMOUNT OF THE JUDGMENT CORRECT?

This is an action at law, not a 'special proceeding' for a writ of mandamus. The plaintiff must prove both a legal cause of action and a state of facts which justifies enforcing it by that writ. Hence, the judgment was drawn as in any case at law—to adjudge a legal liability for a definite sum due at its date. Apparently the defendant's counsel have confused the ideas of jurisdiction and of practice, and would have had us draw the judgment in the form of a peremptory writ of mandamus. But that is not the practice in the Federal Courts. The

judgment is enforced by the writ, but is not the writ itself. In the sense of being "owing' the debt is adjudged to be 'due'. It is collectible not forthwith, but in process of time, by means of the writ, under the statute. Hence the judgment is in proper form, as a necessary preliminary to the writ; and whether the next money in the fund must be paid to the judgment creditor or to some other who has a prior right to it, the adjudication of a debt must precede the writ as a *sine qua non* to compel the council to act.

Similarly, the judgment was drawn, as all judgments at law are, to establish the amount of the debt on its date. It does not allow or adjudge future interest. If we shall become entitled to such accruing interest, it will be because the *law,* not the judgment of the court, allows it to us as an incident of the judgment.

The statute, after stating that judgments on written contracts shall bear interest at the contract rate not over ten per cent, proceeds: 'All other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof'.

Sess. Ls. 1899, ch. 80, § 6.

Remington's Codes (1915) § 457.

Such interest would not be compound interest

on the warrants, but like costs, a mere incident of the judgment, without which we never would have been able to realize anything on our just claims. In that sense, it would be a penalty for not paying a just debt earlier, as the city could have done by a full levy each year.

But that question is not before this court now, and will not be before the lower court till there is cash in the city treasury, the payment of which will include interest accrued since the date of the judgment. The judgment simply declares the amount 'due', that is, 'owing', by the city on our warrants at its date, and then says that we shall 'have process of this court' to collect it 'according to law and the practice of the court'. As the only process we can have is a writ of mandamus, when it comes to the point of suing out the writ the court will mold the writ to suit the circumstances and exigencies of the case, as they then exist, 'acording to the law'. In the writ it will give the proper directions as to disposing of the money which the court will require the city to raise by taxation.

V.

DOES THE AMENDED COMPLAINT STATE A CAUSE OF ACTION?

The sole criticism of the complaint under this

head is that it does not allege a demand and a refusal of the council to levy a tax (although it does allege a demand and refusal of the city treasurer to pay the warrants); and it does not show the amount of cash on hand.

The latter point is met by the defendant's admission of the amount on hand after the case was at issue. (Transcript, 157.) Indeed the stipulation of facts shows in full and clear detail the state of assets of the indebtedness fund, and the disposition made of them. These facts being in the record by mutual consent, any vagueness of the pleadings will be taken to be cured as by amendment.

The point of no demand is met by the rule that the law does not require a vain thing. It is perfectly obvious that the council would have refused compliance, because the city contests these and all other warrants of this series on the merits. A demand is meant to give a chance to comply; and if it is evident there was no intent, with or without demand, to do the act desired, demand is useless. If on the other hand, for lack of a demand which would have been obeyed, the defendant has been needlessly sued and damnified, he can plead in abatement that he would have complied if given the chance and was and still is 'ready, able and willing';

and the suit will abate. But here there is no such plea, nor even one that they are now willing. And if there had been a plea in abatement, its joinder with pleas in bar would have waived it.

All this, however, is the technique of practice. The substantial answer is that we have to show that a debt is owing which the city has not present means to pay, but it has power and resources which it should use to hasten payment; and the demand on the council is only a last formality after the essentials of reducing the debt to judgment have been duly established. That should come after, not before, the action at law, as the quotation from 13 Ency. Pl. & Pr. in the defendant's brief, p. 26, shows. The defendant's argument on this head, too, clings to the confusion of thought between an action at law on a city debt in this court and a special proceeding for mandamus under the code in the state court.

VI.

HAS THE STATUTE OF LIMITATIONS RUN ON THE CAUSE OF ACTION?

The argument here seems to be that because the statute does not begin to run on a warrant till we can sue on it, and we cannot sue on it till the treasurer has the cash to pay it, *therefore* the statute

began to run in 1898 when the city should have begun to levy taxes to pay the warrants! A curious *non-sequitur!* Another instance of confusion of thought between two distinct things: a suit against a treasurer for the cash which he has in hand and will not pay on a warrant next in order of payment, and a suit against a city council to compel it to put money into the treasury. If the suit will not lie till there is cash in the treasury, then the city can put it off forever by simply not raising the money, and the debt will never outlaw and never be paid. On the other hand, the argument seems to be that we could sue as soon as the council failed to levy a six mills tax to pay the warrants—which was in 1898. Therefore, the six years statute then began to run. But the learned counsel have been arguing that all these years the city has had many other resources than a levy, and the council still has a discretionary right to consider all the liabilities and resources and decide whether in its judgment it is necessary to levy a tax to meet the warrants; and therefore, we have not yet a case ripe for mandamus! The arguments are mutually destructive.

There is no statute of limitation on such an action as this. The six years statute as to actions on written contracts runs from the date when they mature. That applies to a warrant for which there

is cash in the treasury, because it is then presently payable; and such a suit would be brought against the treasurer for refusal to pay. It would not lie against the city itself. On the contrary this action is to get a judgment that the warrant is owing, as a preliminary to process to make the city put money into the treasury to pay it. Not the warrant only, but the breach of the duty to raise the money to pay it is an essential part of the cause of action. No statute of Washington applies to that breach. Up to a few years only before this suit was brought in 1910, the city was still realizing cash from assets of the indebtedness fund—both old tax-dues and current levies. There was at least a plausible or a debatable ground for insisting that the city was doing its duty. Soon after that plausible ground vanished, this suit was brought. (Transcript, 155-156.)

See Transcript and brief in this cause on former writ of error.

First Nat. Bank vs. Port Townsend, 184 Fed. 574.

It cannot be true *both* that the time is not yet ripe for a mandamus, and the cause of action is outlawed. Nevertheless it does not follow that because one is not true, the other is. They are not

necessarily reciprocal alternatives. This defense is to be tested on its own ground—has the cause of action in this case existed so long before suit was brought that it is barred by lapse of time under any settled rule of law or applicable statute? No such rule of law and no such statute is pointed out by the defendant's brief.

VII.

WERE THE WARRANTS ORDERED AT A LEGAL REGULAR MEETING OF THE CITY COUNCIL?

This is the issue of the so-called 'adjournments' on February 15 and 16, 1898. The subject was most thoroughly investigated as to the facts, and discussed as to the law in the lower court and at this bar in

Intermela vs. Perkins, 205 Fed. 603,

and was completely disposed of by the opinion of his Honor, Judge Wolverton. The same minutes of that council meeting on the three days, February 15, 16 and 17, were before the lower court in that case as in this: and of course they are the best and the conclusive evidence of the actual facts. See the Transcript in the *Intermela* case on the files of this court, and 205 Fed. 611, 612; and compare that

record with the record in this cause, at Transcript, 188-192, 166-167. The court's findings on this issue of facts are the 7th, 8th and 10th, pp. 112-114. The judge personally inspected the minute-book; p. 167. The bill of exceptions states that a copy of the minutes of the three days' proceedings, February 15, 16, 17, is shown by Exhibit B; but that exhibit only contains the minutes of February 15. (Transcript, 188-192.) They distinctly state that after the proceedings stated in them, '*on motion the council took a recess until three o'clock P. M. February 16, 1898*'. But, although Exhibit B is defective in not giving the minutes of the other two days, we have the essence of them. For it is stipulated that on February 16, at the hour set, all the members of the council were present and the subject of paying the judgments was discussed and a resolution was unanimously passed, reciting the judgments and the council's opinion that they were just and legal claims and should be paid, and therefore that they were '*hereby allowed and ordered paid as claims against said city and that warrants be drawn in the usual form*', etc. But this allowance was conditioned 'that *all of said parties accept the conditions herein named on or before February 17, at three o'clock P. M.*

On the next day all the judgment creditors filed

their written acceptance; and thereby the order of allowance passed by the council on February 16 became absolute. (Stipulation of Facts, Transcript, 143-145.)

The facts as to the recesses continuing the meeting from the 15th to the 16th, and from the 16th to the 17th, are stated more fully in the record in *Intermela vs. Perkins,* 205 Fed. 603, and in Judge Wolverton's opinion on page 611; but, in fact, as we have shown, the warrants were ordered on the 16th and not on the 17th, and we have in this record without referring to that case, the most explicit proof that the meeting was continued by recess and not by adjournment. The two cases are therefore identical on this defense of 'an adjourned meeting', and that issue was squarely met and flatly defeated by the opinion in the *Intermela* case. While it is not *res adjudicata,* because the plaintiff here is not in privity with Perkins, it is as plain a case of *stare decisis* as can exist. It is not only a parallel instance, as usually occurs when the doctrine of *stare decisis* applies; it is the *identical* instance: the same meeting, another of the same judgment creditors there present and accepting, another of the same series of warrants, springing out of the same negotiation.

But the defendant's counsel in this case at-

tempted to raise a distinction based on a few words in the opinion of this court in the *Intermela* case. It is there said, incidentally, and not as essential to the legality of a recess that the council '*finding itself unable to complete or transact the business in hand,* took a recess'. 205 Fed. 611. And upon that slight peg is hung the attempted defense in this case that the meeting on February 15th was so short that there was ample time then to dispose of this subject of the judgments and say 'Yes' or 'No' on any question of payment, and because that was not done, the meeting of February 16th was not a 'recess' meeting, but an 'adjourned' meeting, and therefore that and all the warrants were illegal!!

In support of this remarkable theory that council meetings and the contracts authorized thereat are to be tested by the clock, there were produced the city clerk then in office, and his successor, the present clerk.

(Testimony of Anderson and Duddenhausen, Transcript, 166-72.)

All that their testimony came to was that the meeting of the evening of February 15th was rather short; Duddenhausen, the then clerk, could not 'particularly recollect'; he thought so, 'judging from the minutes and my recollection'. 'The length of the

minutes has some relation to the length of the meeting, but not always'; they would not indicate 'absolutely whether it was long or short'. The strongest impression on his mind was that the meetings were continued because the council and mayor *'tried to get the best conditions'* from the non-resident lawyers representing the creditors *'and for that reason they were not ready to take final action; that is about it'.*

Anderson, the present clerk, testified that, judging from the minutes of the council meetings generally, the meeting of February 15th was a short meeting; but he was not allowed to testify from an inspection of the book how the meetings in 1898 compare in length with those of 1915. Experts are permitted to state many things which they extract from looking at writings, but we have never yet known a court to allow a witness to tell by looking into a minute book written by another, how long a meeting twenty years ago lasted.

The testimony is of the vaguest, as a measure of the length of the meeting. But even if we had had by an automatic clock an exact record, what of it? Are we to hold a stopwatch on a city council? Are its acts and the rights of contract based on them to stand or fall on the time they took, and the time left unused on that evening? Absurd! But

that is where the counsel's argument leads. If the matter could have been debated and voted on in another half hour or even hour and a half, before a late bed-time, the council was bound to do it, and so the recess meeting of February 16 was illegal and all the warrants fall! Why not say at once they were bound to stay no matter how long and end it? But as suggested by Judge Wolverton, the council 'found itself unable to *complete or transact the business in hand*'. The learned counsel have forgotten that it takes time, deliberation, negotiation to complete many important matters. The old clerk said truly, the city officers were trying to get the best terms. They could not close them that night. So they took a recess to the next afternoon. And the very fact that they entered on their minutes that they took 'a recess' shows that they had in mind the charter restriction as to 'adjourned meetings', and heeded it, and therefore advisedly and deliberately did everything in due order.

Both the spirit and the letter of the charter were obeyed. As was ruled in *Intermela vs. Perkins,* a recess from hour to hour or day to day may keep alive a meeting for a specific purpose of business then 'on the table', which could not be done by adjournment to a remote date, or for the purpose of taking up new business. No authority cited or

that we can find goes to the extent of denouncing such a recess. And the reasonable interpretation of the charter provision is that it only forbids the transaction of *new* business, not previously submitted to the council at the date of a regular meeting and thus announced to the public. The abuse at which it was aimed was the introduction of new business at a deferred session, thus facilitating the concealment of something which could not bear publicity.

Now in this affair any citizen in attendance on the evening of February 15 and all the councilmen were informed by the clerk of the demand made by the creditors. They knew that it was held open, and was the only matter so held, for consideration on the next afternoon. It was of deep importance to the city, whose officers were trying to do their best. Evidently negotiations were afoot. We may presume that they had to be disposed of, or at least it was for the city's interest to do so, without delay. It was a proper situation for a recess to consider, negotiate and decide. That is the sensible, rational view of the case. It was a sincere, genuine recess for that sole purpose.

Seymour vs. Ellensburg, 81 Wash. 365, is cited to the rule of strictest compliance with statutory requirements as to municipal powers. The general

principle we admit; the defense strains it excessively in applying it here. There the question was whether warrants which omitted all indication of their purpose were valid. Obviously they were not, for words stating the purpose are as much a part of the essential contents of the warrant as its amount or the signatures. And that is just what the Supreme Court of Washington said: that if the warrant need not specify the purpose, 'then any other requirement of the statute as to what *the warrant shall contain* might be omitted'. The difference between the contents of a warrant and a regulation of the details of its allowance is plain.

The testimony of the witnesses is offered not to impeach the record (which it could not do) but to prove a recess was not necessary. On the contrary it proves exactly the case stated by the court in *Intermela vs. Perkins*—that the council finding itself *unable to complete or transact* the business in hand at that session, took a recess.

VIII.

WERE THE JUDGMENTS AND THE WARRANTS ISSUED IN PAYMENT OF THEM FRAUDULENT AND VOID?

The defendant's argument under this head is based on a false assumption of fact, viz: that the

judgments were taken by consent of the city attorney and council, that there was a pretended but no real defense, and the city officers agreed with the warrant holders that they would make no defense and take no appeal in any cases then brought or to be brought.

There is absolutely no evidence of all this. The pertinent facts shown by the record in this case are in brief these:

Four cases entitled:

Bank of British Columbia vs. Port Townsend,

E. M. Johnson vs. Port Townsend,

E. Henschober vs. Port Townsend,

First National Bank vs. Port Townsend,

were begun some time before the judgments were obtained. It does not appear when, but they went to the Supreme Court on appeals from dismissals on demurrer, as admitted (Transcript, 175).

Bank of British Columbia vs. Port Townsend, 16 Wash. 450;

E. M. Johnson vs. Port Townsend, 16 Wash. 701;

E. Heuschober vs. Port Townsend, 16 Wash. 701;

First National Bank vs. Port Townsend, 16 Wash. 702.

They all involved identical issues, and all depended by stipulation on the decision in the first case named. Evidently they were begun long before they came to judgment, for the Supreme Court decision was handed down on February 11, 1897, and they seem to have gone up on dismissals upon demurrers to second amended complaints. See Transcript, 27. The ordinary procedure to reach that stage of the pleadings and an appeal, argument and decision after that takes some months at least. Other cases were brought on similar grounds by other warrant holders, and seem to have awaited the outcome of appeals in these four cases. One of them was that of *The Manchester Savings Bank vs. Port Townsend,* in which the complaint was verified on June 25, 1895. (Transcript, 47-69). The complaint in that case and the Bank of British Columbia cases are copied into the answer in this case and set forth verbatim at pp. 27-46, and 47-69 of the Transcript. From these it appears that the cause of action in the British Columbia Bank case was the city's failure to collect the assessments for the street grades and thus to provide a fund to pay the grade warrants, so that the assessments became outlawed (Transcript, 30, 31); and that in the Manchester Bank case was

the city's failure to take any steps, make or pursue any assessment, or provide any fund. (Transcript, 64, 65). At some time or other nine cases in all were brought—mostly by different attorneys. There is not the least sign of fraudulent collusion among them or with the city attorney or officers. Each lawyer, like the Gow Chrom, was fighting for his own hand. Naturally there was co-operation in abiding the result of a test case. While the details of contracts, grades, etc., varied, all turned on the question—Is the city liable if it fails to provide, or to enforce and keep alive, assessments on the abutting property, as a resource to pay the grade warrants? Whether the default was in creating the fund, or in letting it lapse and outlaw, the same question arose. That the city made an honest and vigorous contest is shown by the fact that the Bank of British Columbia did not get its pleadings into shape for a test by appeal before its second amended complaint. The other three cases appealed were apparently in a like condition.

The opinion in *Bank of B. C. vs. Port Townsend,* 16 Wash. 450, was written by Hon. Thomas J. Anders, who sat on that bench for many years—an able, painstaking judge. He summarized the same complaint which is pleaded *verbatim* here (Transcript, 27-46), and then discussed plainly, without

evasion, all of the points made against the complaint, particularly the vital point of the city's liability.

The city's liability was thus settled in those four cases. The decision, right or wrong, and whether or not it was overruled by

German-American Savings Bank vs. Spokane,
17 Wash. 315,

was the law of those cases. It became *res adjudicata* in those cases; and the court will observe that of the thirty warrants in suit herein, sixteen, aggregating $7880.00, were issued to the Bank of British Columbia, in part payment of the judgment granted to it in consequence of that decision.

But furthermore the same decision, if not strictly an estoppel of record in favor of the plaintiffs in the other five cases, was binding on the courts as an adjudication on a state of facts similar to theirs, and justified like judgments for them. Indeed many authorities hold that appellate decisions are binding not merely as authorities but as adjudications in parallel cases brought by other parties arising from the same transactions.

The decision in 16 Washington having been made in February, 1897, for some reason not apparent the four cases appealed and four others were not pressed for trial till in December, 1897. That

certainly does not look like any collusive agreement. The ninth case, by Elliott, was brought to trial earlier, because, as shown by *Intermela vs. Perkins,* which grew out of the Elliott warrant (No. 2 of this series), the time to appeal expired about the time of the meeting of February 15, 1898.

This brings us down to the actual trials and entry of judgment—on December 18, 1897, for the hearing and later dates for the signing of findings and judgments. The defendant's counsel argues that the filing of so many exhibits in those cases on the same day, and the immediate allowance of judgments infer a collusive understanding between the opposing attorneys. It is the barest conjecture, born of imagination and suspicion. The law had been settled; the city evidently had no defense on the facts, and there was nothing to do when the proper documents were presented to make technical proof, but to enter judgment. The essential issue was single and simple—the city's liability. That was well understood by the court and by the counsel on both sides. The multiplicity of the documentary proofs neither complicated the issue nor impeached the fairness of the trial judge's prompt decision. If there was any fraud or collusion among the attorneys, we should have some other evidence of it than a copy of the court minutes showing numerous

filings. And if there was none, the objection is an insinuation against the character of the trial judge.

The counsel next asks this court to take judicial notice of the fact that 'all important cases are appealed to the Supreme Court, especially in the State of Washington'! This would make 'judicial notice' a good deal more elastic than that famous variable measure known as 'the chancellor's foot'. We have lately known a trial judge in Seattle, moved by a fervid conviction of the ills of intemperance, to take judicial notice that a saloonkeeper pays and can afford to pay much higher rents than other folk. But it is going him 'one better' for a court of another sovereign to take judicial notice of the amount and relative importance of all appealed and unappealed litigation in a whole State.

Soberly, and in cold fact, there is not a scintilla of evidence that these judgments were 'consent judgments', that there was any collusion or secret understanding. The whole idea is nothing but innuendo and 'fancies light as air'.

The same thing is true as to the conclusion of the city council to pay the judgments. Much is sought to be made of the interview with Mr. Coleman (Transcript, 162-168), and the advice he gave. But the very fact that his advice was asked and the

mayor and council did not rely solely on the city attorney shows an absence of collusion or fraudulent intent. And even 'legal fraud' cannot be inferred from a painstaking search for the wisest course. These cases had once been to the Supreme Court. It does not infer fraud or even that acquiescence or consent which sometimes is called 'legal fraud' that the council did not decide to appeal them again. Everything was open and public. The thing was not done in a corner. Every councilman, the mayor, clerk, marshal, city attorney were present at the three sessions on February 15, 16 and 17. The recess sessions were held in the day-time. Evidently negotiations were going on. There was not a dissenting voice in the ultimate conclusion that the best thing was to settle and pay up.

But the defendant's argument is based not only on a false assumption of fact, but on an erroneous statement of the law. *German-American Savings Bank vs. Spokane,* 17 Wash. 315, on which it depends, did not decide absolutely and unequivocally that a city is not liable and cannot become liable for a default to enforce and collect street grade warrants. The majority opinion in a very diffuse and discursive review of the arguments, pro and con, and of decisions in other states, suggesting and not answering sundry questions of the basis of municipal

liability, finally said that they (the majority) 'are of the opinion that the decided weight of authority is against allowing a recovery of the city' upon failure to collect street grade wararnts, '*in the absence of an express lawful contract to that effect.*' 'However,' it said, 'it is not necessary to go that far in this case, at least at this time. But we desire to reaffirm the doctrine laid down in *Stephens vs. Spokane,* 14 Wash. 298, that there can be no recovery of the city at all while the assesment plan can be enforced in any way.' 17 Wash. 340, 341. Further, after discussing other cases in Washington, it said: 'In view of this and the subsequent expression noticed in later decisions, we desire to regard the express point above mentioned [the point of the city's liability for failure to make or collect the assessment] as not definitely settled or passed upon here, except in so far as sustaining the complaint in the *Port Townsend* case alluded to [*Bank of B. C. vs. Port Townsend,* 16 Wash. 450] may have incidentally held it as the law of that case,' p. 342. And then it asks and leaves unanswered several questions as to the ultimate ground of the liability. pp. 342, 343. All this shows that the whole subject was in a state of flux in the minds of a majority of that court. So that the very point in this German-American Bank case—viz.: 'the delay and negligence on the part of the city's officers in

providing the fund'—was left open for future discussion and unequivocal decision, although in the actual case at bar there, the plaintiff was defeated. If this court will take the time patiently and critically to read that lengthy and somewhat confused and involved opinion, and to compare it with that in *Bank of B. C. vs. Port Townsend* and with the later cases, it will see that nothing was absolutely settled in the German-American Bank case; that earlier cases had positively held cities liable for such defaults; that there was a period from 1897 onward, when the law was unsettled, and that the broad general doctrine that a city cannot be made so liable in any event and under any circumstances, for which the defendant's counsel contend, has never yet been established as the law of Washington.

Now the complaint in *Bank of B. C. vs. Port Townsend* charged as the ground of action that the city had by ordinance prescribed a method of assessing improvement charges, and laid the levy, under contract with the contractor to provide a fund to meet the warrants to be issued to him, but it had neglected to create the fund, to collect the charges and to enforce the lien for them, and it had let the legal time for collection lapse so that the lien and assessment were lost.

(Transcript, 28-31.)

In *Manchester Savings Bank vs. Port Townsend* the complaint in fuller detail pleads the ordinances establishing the system of street assessments and the district to be improved, the contract let for it, and the city's refusal to make the assessment, or take any steps to collect the cost of the improvement, although the plaintiff had 'repeatedly applied' to the mayor and council to do so; that the value of the abutting property had fallen meantime and the lien had been lost by lapse of time and by intervening transfers and tax-liens.

(Transcript, 51-67.)

We see, then, that the German-American Bank case, on which such reliance is put,

admits that the *Bank of B. C. vs. Port Townsend,* 16 Wash. 450, established the law of the case for those suits;

admits that the city may make itself liable by an express lawful contract;

and does not unequivocally rule that the city is not liable for failure to create the fund or enforce the assessment, but leaves the question open.

Therefore we have here a situation where—four of nine judgments were controlled by *Bank*

of B. C. vs. Port Townsend, 16 Wash. 450, *as the law of those cases,* and the other five were governed thereby, even if it was not expressly *res adjudicata;*

the city by the terms of the grade warrants guaranteed their payments, and in reliance on that the contractors accepted them and believed the city would collect the assessments; and

all nine judgments fall within the qualifying clauses of the opinion in *German-American Bank vs. Spokane,* 17 Wash. 315, as possible grounds of municipal liability.

Most of the cases in Washington which the defendant's brief cites under this head were cited by the same counsel in *Intermela vs. Perkins,* and were analyzed and explained in our brief therein. To avoid repetition, we beg the court to consult those briefs. On the main grounds of defense, this cause is simply a twice-told tale.

The well-settled rule that the merits of a cause once litigated and passed into judgment in a court of general jurisdiction cannot be re-opened and retried, needs no discussion—although it had to have such in the *Intermela* case to repel the defenses's insistence that it could re-try those old cases.

Cromwell vs. County of Sac., 94 U. S. 351;
United States vs. New Orleans, 98 U. S. 381;

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5.

But there is an effort now in this case to take this case out of the general rule on the ground that those were 'consent judgments', and on such the court will not hold itself bound by the prior record, but will look into the merits, especially where the new case is brought to enforce the old judgment by special process.

The argument depends on the assertion of 'consent judgments', and without that fact, it falls. As to that we have only this further to say:

The record is wholly bare of evidence of any agreement, express or implied, open or collusive, corrupt or merely unwise, between any of the city's officers and any of the creditors or their agents, that the city by default or otherwise, would let judgment go against it, as to any pending or future cases;

It is wholly bare of evidence that any such judgment was entered, with or without agreement.

The answer pleaded that defense, but no evidence in support of it was offered.

Some cases cited on this point may receive brief comment.

Ward vs. Joslin, 186 U. S. 142,

arose under a state statute which imposed a *double* liability on stockholders. Of course, they are compellable to pay into the treasury their single liability on stock subscriptions; but as to the additional amount the court held that a judgment against the corporation on an *ultra vires* contract was not binding on the stockholders, on the ground that the state constitution and statute only imposed that extra liability as to debts incurred in usual course of business and within the corporate powers. This case has only the remotest resemblance to the case at bar.

Schrader vs. Mfrs. Nat. Bank, 133 U. S. 67, was another case of stockholders' liability. After the bank had failed, its president had settled with certain creditors, in part by turning over to them bills receivable of the bank with indorsement or guaranty in the bank's name. Some years later a suit was brought and judgment taken on such attempted liability of the bank, without the knowledge of its stockholders. It was held that the president had no power to create or continue a liability of a bank in liquidation, and it was open to the stockholders to attack the judgment when sued on their personal liability, because that liability was

only for the debts incurred in the regular course of business, which ceased when the bank failed.

Brownsville Taxing District vs. League, 129 U. S. 493,

was a case of mandamus to levy a tax to pay judgments for interest on bonds. It was held that by repeal the city had lost the power to tax for paying the judgments; that thereby the judgment creditors were thrown back to the bonds, and that the bonds were issued under an abrogated statute, so that no power to tax remained existent. It does not resemble this case even remotely. There will be here no need, as there, to go back to and depend on the original causes of action which were merged in the judgment, because the judgment here before the court is a self-sufficient verity, and to enforce it by the process of this court we do not need to show its cause or origin, or that of the former judgments which were the source of the warrants for which this judgment was rendered.

IX.

IS THE CONSTITUTIONAL DEBT LIMIT A VALID DEFENSE?

The case of

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5,

cited in our brief in *Intermela vs. Perkins,* is conclusive on this point. It has never been overruled or qualified.

This court said, in the *Intermela* case,

> 'There is no evidence on the record showing that the City of Port Townsend was indebted beyond its statutory limitations at the time the indebtedness was incurred for the local street improvements in question, although the answer alleges facts showing that such was the case. Further than this, it is at least a disputed question whether such indebtedness as may be thrust upon the city by neglect or refusal to perform its obligations with contractors for local improvements, in providing funds for the payment of such contractors, falls within the inhibition against incurring indebtedness beyond a specified sum. *Baker vs. City of Seattle,* 2 Wash. 576, 27 Pac. 462; *Winston vs. City of Spokane,* 12 Wash. 524, 41 Pac. 888; *McEwan vs. City of Spokane,* 16 Wash. 212, 47 Pac 433; *Denny vs. City of Spokane,* 79 Fed. 719, 25 C. C. A. 164. But, be that as it may, in any event the question is one involving the application of general law in connection with statutory construction, which a court of general jurisdiction is competent to entertain and decide.'

As there suggested, the question is one of general, not local, law. The federal courts follow state courts in their construction of local statutes; but they decide for themselves whether a given question falls within or without the purview of state statutes. The questions here are largely in the field of general jurisprudence. The Washington courts do not place

their decisions on municipal liability upon local statutes, but on the general law of municipal corporations. The eminently wise and just principle established by the federal courts for the protection of non-resident creditors, that their rights cannot be destroyed by a change in judicial decisions of local courts after the rights become vested, applies with peculiar force here.

Gelpcke vs. Dubuque, 1 Wall. 175,

is exactly apposite to the case at bar, if we assume that the *German-American Bank* case was a complete and unequivocal reversal of the former rulings of the state court. In each case, earlier rulings of the state court had become settled law that a certain class of liability existed; in each paper instruments had been accepted for value on the faith of that settled law, and rights had become vested; in each a later state ruling was inimical to that reliance reposed by a non-resident creditor. The parallel is exact.

In later decisions the U. S. Supreme Court has gone farther and held that 'in matters of contract it is the right of citizens of the different states to demand the independent judgment of the federal courts, even though their decision may involve to some extent state statutes.'

Butz vs. Muscatine, 8 Wall. 575;

United States ex rel. Army vs. Burlington, 154 U. S. 568;

Pleasant Twp. vs. Aetna L. Ins. Co., 138 U. S. 67

But we do not need to go so far. We plant ourselves on *Gelpcke vs. Dubuque* as all-sufficing for this case; because it completely disposes of every contention of the defendant. For the doctrine of equitable estoppel on which that case rests goes behind all questions of loss of jurisdiction or of power of the city to become liable by change of court decisions, erroneous judgment of the state court that the city was liable, constructive fraud by waiver of appeal and by compromise, power of the city council to issue the warrant, and depends on that *good faith* as the cement of all human relations (municipal and personal alike) which it is one of the high functions of the federal courts to vindicate.

CHARLES E. SHEPARD,
Attorney for Defendant in Error.

November 10, 1916.

No. 2833

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Defendant in Error.

ADDENDUM TO THE BRIEF OF THE DEFENDANT IN ERROR.

We beg leave to submit to the Court the following observations, which were suggested in argument at the bar, but were not stated in our brief.

Under Point VII. on the legality of the proceedings at the 'recess' sessions:

Quite independently of the construction or effect of the charter provision, prohibiting the allowance of claims at 'adjourned' meetings, the city is estopped by its course from raising that defense. The judgments had been entered; they were debts of record—to all appearance and on the

face of things unimpeachable verities. It was necessary for the city within a short time to take one or two courses: that is, either (1) to attack each of those nine judgments by an appeal or by a petition or other legal mode of setting aside or opening the judgment; or (2) to pay it. For if neither were done, mandamus to compel payment was in near prospect. Thereupon the judgment creditors came to the city authorities for payment; and the council said 'We will pay you now, by warrants'. The creditors said 'We accept', satisfied their judgments and took the warrants. Now if the city within some reasonable time after that had repudiated its action, the creditors might have been put *in statu quo*—though probably only on condition of terms, such as to reinstate the judgments and pay costs. It might even be plausibly argued that that might be done even up to the extreme limit of outlawry of the original causes of action, or of the judgments. But by this defense of technical illegality, if successful, the city will have led us to satisfy judgments which we cannot now reinstate, because both the judgments and the causes of action are far past outlawry. Nor could the city say, it would waive that defense to a new suit; for its counsel's position is that a city cannot waive or consent to anything; and even if it could, we could not be restored to our former position, for a new

judgment would have to be paid by new indebtedness fund warrants, after a long list of intervening warrants.

It is a situation, therefore, where the familiar principle of estoppel *in pais,* or equitable estoppel, applies: the city has led us into a position where we cannot retract, and hence it is estopped from saying that its act which led us there was illegal.

Nor should it be overlooked that the council's resolution did not create any new debt. The debt was already existent, and of the highest verity; its form only was changed. And that change bore all the marks of unanimous approval and perfect regularity. The warrants went out, and were dealt with, in the market, as such warrants usually are; and even though not strictly negotiable under the law merchant, are universally known to be sold and bought as investments, like negotiable paper. Therefore the charter provision should be construed as a regulation of the council's mode of transacting its business, rather than as a prohibition avoiding in the hands of innocent purchasers any instrument created in contravention of it. It is like the statutes prohibiting a corporation of another state from doing business without filing its articles and appointing a local agent for service of process; under which it is now well settled, even as to non-

negotiable liabilities that the statute is not a defense against a contract made in disregard of it, unless it expressly denounces as void any such contract and forbids a suit on it. The issue of a warrant, duly signed, under such circumstances, involves an implied recital of technical regularity and validity, as well as the express recital of its consideration and purpose.

Under Point VIII. on the validity of the judgments:

Nearly the same as the foregoing may be said in rebuttal of the city's plea that the judgments were 'fraudulent and void'. The law very wisely holds that one who acquiesces in or who treats as valid an apparent liability is debarred, at least after a reasonable time, from saying it was not valid. Such shifting of attitude amounts at the least to a waiver; at the most to an absolute estoppel. Particularly so, where not merely the original creditor, but others, nay many others, who have dealt in reliance on the city's acquiescence and waiver were thereby lured to their loss, if the city can now shift its stand. And all the settled doctrines of law, as to judgments—that they are presumptively unimpeachable, that they must not be lightly set aside, that the defense of fraud, *dehors* the record, must be established not only by the weight of evidence,

but by its overwhelming preponderance, that fraud will not be surmised but must be clearly and positively proved—all these and allied doctrines which uphold the stability of courts, and are so familiar that they hardly seem to need mention, unite to show how flimsy, how unsubstantial in both law and fact, is this defense.

CHARLES E. SHEPARD,
Attorney for Defendant in Error.

2833

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND, WASHINGTON,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Defendant in Error.

Reply Brief of Plaintiff in Error

U. D. GNAGEY, L. B. STEDMAN,
Attorneys for Plaintiff in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

GREENWOOD, PRINTER, PORT TOWNSEND, WASH.

In the United States Circuit Court of Appeals,
For the Ninth Circuit.

THE CITY OF PORT TOWNSEND, WASHINGTON,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Defendant in Error.

Upon writ of error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

There are certain matters in the brief of defendant in error that require a specific reply in order to enable the court to arrive at the facts as shown by the record and the law applicable thereto.

THE FINDINGS DO NOT SUPPORT THE JUDGMENT.

One of our assignments of error is that the findings do not support the judgment. The law of this case as established on a former writ of error is that the plaintiff below must allege and prove facts which in a court of the state would entitle him to a mandamus. According to the same rule the findings in order to support the judgment must likewise show such facts.

Counsel for defendant in error seems to find fault with the decision in the case of *State ex rel American Freehold-Land-Mortgage Company vs Mutty*, 39 Wash. 624, and says that such decision is "based on the very narrow ground of a debatable discretion to levy a six-mill tax, and on the rather violent presumption that a levy of one mill on $930,946 valuation sufficed with some old taxes that had run over eight years to keep up with a warrant indebtedness of $125,000." (Brief, p. 26.)

Counsel wholly mistakes the position of plaintiff in error in this case and of the Supreme court of the state in the Mutty case supra. It was not necessary to make any presumption in favor of the defendant in the Mutty case to defeat the plaintiff in that case, nor was it necessary to make any presumption in favor of the defendant (plaintiff in error) in this case, to defeat the plaintiff's case as made by the original complaint.

In a case of this kind it is necessary for a plaintiff to show certain facts in order to succeed. If such facts are not shown no case is made, and the action fails. In other words, the court will make no presumption in favor of the plaintiff in order to assist his cause of action. The plaintiff succeeds or fails on the facts as shown by himself, and not on the weakness or strength of the defendant. Moreover, the court has already fully approved and followed the Mutty case.

Counsel devotes pages 28–32 of his brief in calculating the indebtedness of the city payable out of the Indebt-

edness fund on February 1, 1898, and comparing it with the total resources of said fund. So far as the indebtedness is concerned, he does not attempt to make an accurate calculation of the interest paid on the warrants. The total resources of the Indebtedness Fund are figured at $64,728.59, on the supposition that all taxes levied were collected. The total indebtedness of the city payable out of the Indebtedness fund is figured at $40,738.57. This amount of indebtedness is stipulated in paragraph XXV. of the Stipulation of Facts, record p. 160. The additional indebtedness stipulated in paragraph XXVI. of such stipulation on the same page of the record is wholly overlooked. This additional indebtedness as stipulated is the sum of $53,300 less the sum of $29,100, or the sum of $24,200. Adding this sum to the other indebtedness makes the total indebtedness to be paid out of the Indebtedness Fund the sum of $64,938.57, more than the total resources of the fund as calculated by counsel, without even taking into consideration the interest on the warrants comprising the $40,738.57 of the above indebtedness.

The fact of the matter is that these facts so stipulated are too indefinite upon which to base any judgment for plaintiff, although they might be used to show that the Indebtedness fund is exhausted and that a levy is necessary. This, however, would not affect the question whether the findings support the judgment. If the evidence justifies other findings not made by the court below, this court will take the proper method to supply such deficiency.

IN REGARD TO THE TRANSFERS OF MONEY FROM THE INDEBTEDNESS FUND.

It is stipulated in paragraph XVII of the Stipulation of Facts, record, p. 156, that there have been transferred from the Indebtedness Fund the following sums: On October 4, 1898, $510; on May 18, 1909, $2,500; on February 15, 1910, $787.41; making a total of $3,797.41. In paragraph XIII of said stipulation, record, p. 153, it is stipulated that the Intermela judgment, based on Warrant No. 2 of this series drawn on the Indebtedness fund, was paid after this suit was commenced and amounted to $3,467.63.

By reference to the Intermela case it will be seen that that case was an action against the treasurer for not paying Warrant No. 2, when said treasurer had sufficient funds to pay the same, and by inference it is readily seen that such action was successful because of the said transfers, and the failure to pay such warrant. This shows that the City has already paid the amount of the Intermela judgment or the sum of $3,467.41, because of such transfers made and the refusal to pay the said warrant. It would then be unjust to make the city pay on account of such transfers for anything except the difference between such transfers and the amount of the Intermela judgment or the sum of $329.78.

In speaking of these transfers, counsel on page 34 of his brief uses the following language. "It is a dishonest

trick and sham to let the money go into the proper fund and then by a bookkeeping transfer use it for a foreign purpose."

This charge of dishonesty is wholly unfounded. At the time the last of these transfers was made, the city council had good reason to believe and no doubt did believe that all of these Indebtedness Fund warrants were illegal. Up to that time, one case had been brought on warrants of this series, the case of State ex rel. American Freehold-Land Mortgage Co. vs Mutty, 39 Wash. 624, which afterwards appeared again in 45 Wash. 348, with the same plaintiff, but with Tanner instead of Mutty defendant, the councilmen meanwhile having changed. This case was decided in favor of the city and the warrants involved in that suit were declared illegal. The moneys were transferred from this fund for the simple reason that it was considered that they were not needed in said fund, and they used it for other legitimate purposes, as they had a right to do, if their belief that these Indebtedness Fund warrants were void, was correct. In fact, with the condition of affairs then existing, it was their duty to do just what they did. Yet counsel charges these people with dishonesty, and at the same time attributes nothing but upright motives to the councilmen who in the brief space of a day attempted to put the city in debt to the extent of nearly the whole constitutional debt limits on claims on which the Supreme court said the city was not liable. Counsel might justly be charged with not being a very good judge of upright conduct.

The transfer of $510 made on October 4, 1898, was made as stipulated to the Sinking fund for the purpose of taking up bonds. Such transfers are frequently made in the financial transactions of the city for the purpose of taking up the desired number of bonds and stopping interest on them, and then afterwards replacing such transfer after the further collection of taxes for the borrowing fund. It would appear that this particular amount was not replaced, may be because the city council had placed in this Indebtedness fund according to Sec. 9 of Ordinance No. 722, which said section is set out in full on p. 161 of the record, moneys that were not required to be placed there by law.

AS TO THE AMOUNT AND FORM OF THE JUDGMENT.

Counsel for defendant in error fails to understand the position of plaintiff in error with reference to the amount and form of the judgment. We do not for a moment contend that the court should have granted a writ of mandamus compelling the city council to make a levy, but we do contend that the court should in the first place have limited the payment of such judgment out of the Indebtedness fund of said city, and in the second place, that the amount of the judgment should have been different.

Section 966 of the Revised Statutes, U. S., provides for interest on judgments as follows:

"Interest shall be allowed on all judgments in civil causes, recovered in a Circuit or District court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution; and it shall be calculated from the date of judgment, at such rate as is allowed by law on judgments recovered in the courts of such state."

The law of the state providing for interest on judgments reads as follows:

"Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in said contracts; not in any case, however, to exceed ten per cent per annum: Provided, That said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per cent per annum from date of entry thereof."

We might have set out these laws in our original brief, but we took it for granted that there would be no dispute about the fact that this judgment, as it stands, bears interest, on the full amount from date until paid.

Our contention is that the judgment should read as follows, omitting formal parts: "That the plaintiff do have and recover of and from the defendant the sum of $6,072.80 together with interest thereon from February

18, 1898, and the further sum of $7,880.00 together with interest thereon from February 19, 1898, etc."

Under such a judgment, if levies are made under the order of the court and the warrants in suit are paid in full, together with the costs of suit, the judgment will be satisfied. But if this judgment is allowed to stand, the warrants in suit may all be paid together with the costs of suit, and still this judgment will not be satisfied, because of the interest on interest included in it it will bear, amounting to about nine hundred dollars a year. This as we have shown in our former brief is contrary to the statute.

HAS THE FRAUD CHARGED IN THE ANSWER BEEN SUPPORTED BY PROPER EVIDENCE.

Counsel for defendant in error considers all charges of fraud absolutely without foundation, simply "fancies light as air." He urges the regularity of the proceedings by means of which the city became indebted to approximately the amount of its constitutional debt limit on claims on which it was not liable, the good faith of the counsel that brought about this indebtedness, and an absolute absence of any direct evidence of fraud. All of which makes the remark of Justice Bradley in the case of *Graffan vs Burgess*, 117 U. S., 180 [186], very appropriate. The question involved in this case was whether a certain sale was fraudulent. Justice Bradley in writing the opinion of the court uses the following language:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

There was no direct evidence of fraud in the case of *Kane vs. Independent School District*, 82 Iowa, 5, cited at top of page 59 of our first brief. The court in this case says:

"We have said that there was no direct evidence of collusion between the plaintiffs and directors; that is the evidence does not show that the plaintiffs and directors held a meeting and made a compact or agreement that the plaintiffs should commence an action upon the illegal claim and that the directors should make no appearance and thus enable plaintiffs to enforce a void obligation against the district. But fraud and collusion are not required to be shown by direct evidence but may be proved by facts and circumstances, *and in our opinion the evidence in this case shows that both of the parties to that action intended that the plaintiffs should recover judgment.*"

Notice the italicised words which we have thus emphasized. The fraud consisted in the fact that both of the parties intended that the plaintiffs should recover judgment.

When the city council that is responsible for this great burden had under consideration the payment of the claims of the warrant holders, they passed a resolution offering to pay, and in it they used the following language: "And whereas it is the opinion of said council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid."

Take this very language together with the fact that the mayor and the whole council were unanimous, shows that like the case of *Kane vs Independent School District* both parties intended that the warrant holders should recover judgment, and therein lies the fraud against the taxpayer, Of course it may be argued that this language was used after judgment had been obtained. So it was. But would any lawyer or judge contend that these warrant holders could have gotten judgment against the city in case the city officers had been unwilling to have judgment go against the city. Instead of standing on their legal rights they took it upon themselves to determine whether the claims are just and legal.

There was no direct evidence of fraud in the case of *State ex rel Bradway vs De Mattos*, 88 Wash. 35, yet they declared the judgment involved in that case a constructive fraud against the taxpayers, the principals.

Justice Bradley in the case of *Graffan vs Burgess*, 117 U. S. 180 (186) supra, took it upon himself to read between the lines. This court in this case can do the

same thing, and they will find much food for serious thought.

Take one little item, for instance. The most natural thing in the world for any one to call the cessation of the meeting on the 15th of February, would be an adjournment. Opposing counsel calls the meeting of the 16th an adjourned meeting, as we pointed out in our brief, yet we find that in the minutes it was called a "recess." Evidently these proceedings were guided by one who knew the law, and tried to adjust the action of the council to legal forms.

The only thing that stands in the way of doing justice to the city are the street grade warrant judgments, and the most serious question in the whole case is whether the court can go behind these judgments.

Defendant city has alleged fraud in the taking of these judgments, whether actual or constructive makes no difference, and hence according to the decision in the case of *State ex rel Bradway vs De Mattos*, 88 Wash. 35, this allegation opens up the whole matter for consideration, and allows the court to base its decision on the cause of action upon which the street grade warrant judgments were founded.

Counsel seems to think that we have based our whole case upon consent judgments, and if it is shown that these were not consent judgments our whole case falls. While we are insisting that in fact these street grade warrant judgments were consent judgments, our

whole argument is by no means based on such contention alone.

One of our strongest grounds for going behind these judgments and setting them aside is the fact that they rest on no cause of action whatever, thus bringing them in this respect within the language of Chief Justice Fuller in the case of *Brownsville vs Loague*, 129 U. S. 493, and also within the principle of the case of *Granham vs Mayor of San Jose*, 24 Cal. 585, cited in our brief at p. 59.

In the case of *Bexby vs Adams*, 49 Iowa 507 (510), the court also went back of what was taken for the purpose of that case, a judgment of a court. The court uses this language:

> "But defendant's answer is in the nature of a cross petition and prays relief. It charges fraud in the procuring of the pre-emption certificate and assails it on that ground. Here is a direct attack upon the judgment of the county judge in a proceeding brought to establish its fraudulent character. It may thus be assailed for fraud."

The only fraud, however, that appeared to be in the case was that the judge granted the certificate without requiring proper evidence as to settlement and improvement.

Counsel insists in his brief, p. 65, that it is not necessary for plaintiff to go back of the judgments and depend upon the original cause of action for the enforce-

ment of the judgments. It is, however, necessary to bring this action to enforce those street grade warrant judgments, and if the court allows as a defense to such action an attack of fraud on such judgments, as is allowed in the state courts, then this court in this action can go into the merits of the former judgments before a judgment in this case will be rendered enforcing such former judgments.

This is the rule laid down in Adams Equity, 416; 2 Dan. Ch. Pr. 1614; *Lawrence vs Berney*, 2 Ch. Rep.

The case of *Stein vs Kaum*, 148 Ill. App. 519, is cited as a case showing how far a court of equity will go in order to avoid injustice.

If, however, the court should hold that these defenses cannot be made in this case because they are of equitable cognizance, then the court should make such a decision as will be without prejudice to the city in making these defenses in an equity case. Especially so because the record in this case shows that there is an ancillary equity case pending to preserve the fund out of which these warrants are to be paid if legal. See Opinion, record p. 204 et seq.

In this equity case the same defenses have been interposed to the validity of the warrants, and if for any reason these defenses are not admissible in this action at law, the court should make such a decision as will not debar the city from making them in the equity case, or even in a separate equity suit.

THE POWERS OF MUNICIPAL CORPORATIONS.

Since this case was briefed, another decision of the state court has been rendered touching the strictness with which the grant of power to municipalities is construed.

> *State ex rel. Port of Seattle v. Superior Court of King County*, 51 Wash. D. 165 [Advanced sheets.]

After stating that the doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations, approvingly quote from a Minnesota case the following, which we consider very appropriate in view of the contest over the matter of the adjourned meeting. The quotation is as follows:

> "A different rule of law would in effect vastly enlarge the power of public agents to bind a municipality by contracts not only unauthorized but prohibited by law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

This was quoted after citing the same paragraph from Dillon that we cited in our first brief. If the statute points out ~~any~~ one way of exercising a power of a municip-

ality, it is not for any court to say that another way will do as well. This is a well known rule of municipal law.

20 Am. & Eng. Enc. 1142.
Dill. Mun. Corp., Sec. 239, 5th Ed.

THE GUARANTY OF THE CITY.

It is stipulated in Par. VI. of the Stip. of Facts, record, p. 140, that no contract, ordinance or resolution authorized the city to guaranty the payment of said warrants [street grade warrants]. In the absence of such contract, resolution and ordinance, such guaranty had no force whatever.

Dill. Mun. Corp., 814, 5th Ed.

Counsel mentions this guaranty, brief, p. 5, but does not argue that it has any force.

In conclusion, we desire to say that although the court finds that no particular one of the many defenses interposed to this action is in itself sufficient to defeat the action, yet the facts submitted in support of any and all of these defenses should be carefully considered together in support of the allegation of fraud contained in the answer whether such fraud is constructive or whether it is actual. One of them [defenses] may not be sufficient in itself, but all of them taken together, under all the circumstances of this case, certainly show constructive fraud against the taxpayers of the city.

ESTOPPEL.

After writing the reply brief up to this point, Addendum to the Brief of Defendant in Error was served, and the argument that the defendant city is estopped from urging that the warrants are illegal because ordered at an adjourned meeting, needs a reply.

The judgment creditors were before the city council by their attorneys. The attorneys were supposed to know the law and the powers of the city council. The business transacted resulted in a new contract and compromise. The judgment creditors did not insist on their judgments. The judgment creditors no doubt wrote out their own acceptance, and I am inclined to think that they also wrote the original proposition set forth at page 145 of the record. They, the members of the city council and the judgment creditors, made an agreement—a contract—at those adjourned meetings. The original payees certainly could not claim an estoppel against the city, and according to authorities cited under Argument 10 on p. 65, Brief of Plaintiff in Error, the defendant in error is in the same position as its original payees.

There is nothing in this that has the elements of an estoppel in pais. Estoppel in pais is based on misrepresentation, either by keeping silent or by actual misrepresentation.

11 Am. & Eng. Enc. 423.

Invalid contracts not induced by fraud or misrepre-

sentation cannot be made the basis of an estoppel in pais.

11 Am. & Eng. Enc. 423.

The conduct of all future city officers as shown by the record, could not be interpreted to induce any warrant holder to believe that the city would not urge the illegality of these warrants.

Respectfully submitted,

U. D. GNAGEY,

L. B. STEDMAN,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND, WASHINGTON,
Plaintiff in Error
—vs.—
THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Defendant in Error.

No. 2833

Petition for Re-hearing

U. D. GNAGEY,
Port Townsend, Washington,

L. B. STEDMAN,
Seattle, Washington,
Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND, WASHINGTON,
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THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Defendant in Error.
} No._____

Petition for Re-hearing

U. D. GNAGEY,
Port Townsend, Washington,
L. B. STEDMAN,
Seattle, Washington,
Attorneys for Plaintiffs in Error.

Now comes the Plaintiff in Error by its attorneys U. D. Gnagey and L. B. Stedman, and deeming itself aggrieved by the judgment of this court affirming the judgment of the district court, entered January 31, 1916, petitions for a re-hearing and a reversal of said judgment.

We hereby certify that the foregoing petition is, in our judgment, well grounded and is not interposed for delay.

U. D. Gnagey,
L. B. Stedman,
Attorneys for Plaintiff in Error.

GROUNDS OF PETITION.

The only ground for the petition that we desire to present is that the court erred in affirming the judgment as to the amount and form. The court should have modified the judgment so that the plaintiff in error will not be compelled to pay compound interest in order to satisfy the same. The judgment should further distinctly state that it is payable only out of the Indebtedness Fund.

The court in its opinion did not pass upon our contention that the judgment is erroneous by virtue of the fact that on its face it compels the city to pay compound interest which is expressly prohibited by our statute.

ARGUMENT.

For the purpose of this petition we wish to refer to our argument on the third and fourth assignment of error, pages 19 to 24 of our original brief.

This action is brought for the avowed purpose of obtaining a writ of mandamus to compel the city council to make a levy for the Indebtedness Fund so that relator's warrants may be paid at the proper time; and this court on a former writ of error sustained a demurrer to the complaint for want of sufficient facts, because the complaint did not allege facts sufficient to entitle plaintiff to the writ if it were in a court of the State.

The matter of securing damages against the defendant because of its omission to levy a proper tax is not within the issues raised by the pleadings, yet it appears in some way an effort is made to obtain damages against the city for this alleged neglect.

A mandamus proceeding under our law is not an action to recover money or personal property. In the case of State ex rel. Dudley v Daggett, 28 Wash. 1, 5, the Supreme Court of Washington says: "But while it [mandamus] is an action at law, within the meaning of the word 'action' as used in the constitution, it cannot be said to be a 'civil action at law for the recovery of or personal property.' * * The complainant, under our statutes, in such an action, seeks to obtain a command from a court of law di-

rected to an inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.—§5755, Bal. Code." (§5755 of Bal. 1014 of Rem. & Bal., the present Code.)

"If a person injured by an official omission of a ministerial officer elects to bring an action for damages, he cannot also pursue his remedy by mandamus."—19 Am. & Eng. Ency 906.

On the other hand if he prosecutes a mandamus proceeding, he waives his action for damages.

Kendall v Stokes et al. 3 How. 87, 11 L. ed. 506.

The eighteenth finding of fact made by the lower court reads as follows:

"18. There is now due to the plaintiff from the defendant upon the warrants enumerated in the seventh finding, thirteen thousand, nine hundred fifty-two dollars, eighty cents ($13,952.80), with interest at six per cent. per year on six thousand seventy-two dollars, eighty cents ($6,072.80) thereof from February 18, 1898, and on seven thousand, eight hundred eighty dollars ($7,880.00) thereof from February 19, 1898."

Our contention is that the word due in the finding should not be taken to mean due and payable,

but simply fixing the amount of the face of the warrants in suit and fixing the amount of interest on them by reference to the per cent. or rate, and the time from which the interest runs; and that the judgment according to this interpretation should simply be a copy of the findings so far as the amount is concerned, making that part of the judgment expressing the amount read as follows:

"It is adjudged that the First National Bank of Central City, Colorado, the plaintiff, do have and recover from the city of Port Townsend, the defendant, the sum of Thirteen Thousand, Nine Hundred Fifty-two Dollars and eight cents ($13,952.80) together with interest at six per cent. per year on Six Thousand Seventy-two Dollars and eighty cents ($6,072.80) thereof from February 18, 1898, and on Seven Thousand Eight Hundred Eighty Dollars ($7,880.00) thereof from February 19, 1898, etc."

We further contend that the whole judgment including interest should be made expressly payable out of the Indebtedness Fund so that there can be no further question on this particular point.

These warrants, if valid, were the result of a compromise agreement. They were to be paid out of a certain fund and the warrant holders should be limited to this fund. This agreement is embodied in the resolution passed by the city council, record pp 144 and 145, and the acceptance by the judgment creditors, record pp 145 and 146. It makes a great difference to the city whether these warrants must be paid out of the Indebtedness Fund or the Current Expense

Fund. The Current Expense Fund is also limited in its levy and is barely sufficient now to carry on the city government. If the city would have to pay this judgment out of the Current Expense Fund (the general fund of the city) it would cripple its finances to such an extent that it could not carry on its government.

That we are right in our contention that the city cannot in this action be compelled to pay a larger sum than the face of the warrants and simple interest, although, as it now appears, the city did not do its duty in regard to the levying of taxes for the Indebtedness Fund for a number of years past, is, we think, clearly shown by the case of State ex rel. Polson v Hardcastle, 68 Wash., 548, cited on page 21 of our original brief.

The warrants in suit, however, must be destinguished from the warrants involved in the Polson action, supra. The warrants involved in the Polson case were of the same kind as those mentioned in Stipulation 25, record page 160, as general fund warrants, of which it was stipulated that there were $31,-150.70 outstanding on Feb. 1, 1898, but the principle involved so far as this particular point is concerned is the same. The court in the Polson case at page 556 says: "The record shows that, from January 1 to May 1, 1910, funds more than sufficient to pay relator's warrants received by the city from licenses, fines, penalties and forfeitures, were wrongfully diverted to

the current expense fund; that the relator has been wronged by the continual unlawful acts of the city; that had the city officials performed their duties according to law, his warrants would have been paid, and that no other warrant holder has proceeded against the city. The relator, therefore, contends that he should be first entitled to enjoy the fruits of this litigation by having his warrants paid from the current expense fund to which such receipts have unlawfully been diverted, and that such payment should be made forthwith even though prior general fund warrants are still outstanding and unpaid. This contention cannot be sustained. Section 3947, Rem. & Bal. Code directs that:

"All county, school, city and town warrants shall be paid according to their number, date and issue, and shall draw interest from and after their presentation to the proper treasurer: Provided, that no compound interest shall be paid directly or indirectly on any of said warrants."

"Were this an action in equity, the relator's contention, in the absence of the statute above quoted, might appeal to the conscience of the chancellor. Relator, however, has applied for a writ of mandamus to compel the maximum levy of six mills for the indebtedness fund, and also to compel payment to that fund of all receipts for licenses, poll taxes, fines, penalties and forfeitures, until his warrants are paid. He cannot seek equitable relief, nor can such relief be granted in violation of statutes upon which his rights depend. His warrants will have to be paid in their regular order from the indebtedness fund."

The court then cites section 854, 2 Dill. Mun.

Corp. (5th. ed.) the same citation we have in our original brief, showing that securing a judgment on warrants does not in any way change the priority of the warrants either of those reduced to judgment or those standing in order of payment before those reduced to judgment.

This is a state law interpreted by the state court and the U. S. court will follow this interpretation.

The third conclusion of law made by the court to which we took timely and proper exception is as follows:

"3. It was the duty of the defendant to levy a property tax to the amount of six mills on the dollar of asseesed valuation for the Indebtedness Fund, during every year beginning with 1898, and to apply the proceeds to their proper use according to law, until the warrants in suit with accrued interest were paid." —Record p 17. Exceptions to same, p 124-28.

There is nothing that we can see either in the evidence or in the findings to justify this conclusion. There was no effort made by the plaintiff to show that during all these years conditions existed which entitled it to a writ of mandate and a levy of this six mills, according to the rule laid down in State ex rel. American etc. Mortgage Co. v Mutty, 39 Wash. 624.

The record, p 155, shows the amount of taxes specially levied for the Indebtedness Fund, and at page 156 is shown the delinquent tax collections from 1898 to 1905 inclusive, but this showing leaves out of consideration the proceeds of the sale of county

property received by the city which, according to section 9 of Ordinance 722, set out in full on page 161 of the record was also paid into the Indebtedness Fund. According to the Mutty case, 39 Wash. 624, the city council under the law in question is not compelled to make the full levy of six mills each year, but there is some discretion left to the council, and each particular case must be determined on its own merits, and the burden of proof is on the plaintiff who seeks such a levy.

State ex rel. Ferguson v Grady, 71 Wash. 1 (6) as to burden of proof.

The question whether the city could have been compelled to make the maximum levy of six mills during the years it was collecting the delinquent taxes as shown on page 156 and taking in money from the proceeds of the sale of county property and applying it to the indebtedness fund is purely speculative and is not within the issues raised by the pleadings.

But even if this finding or conclusion were true, according to decision in the Polson case, just quoted, it would and could have no effect on the amount or nature of this judgment.

In view of this conclusion, it is evident that the lower court increased the judgment over and above what it should have been because, as he thought, the city council had neglected their duty for a number of years, as now appears.

It must also be remembered and taken into consideration that the city in good faith believed all these warrants invalid and acted accordingly. Some of the same series of warrants were before the Supreme Court of the state in State ex rel. etc. Co. vs. Mutty, 39 Wash. 624, in September, 1905, and in January, 1907, these same warrants were declared invalid. *State ex rel. etc. Co. vs. Tanner 45 Wash., 348 (the same case.)*

During all these years these warrant holders knew or could easily have known conditions in Port Townsend. The plaintiff held a large amount of these warrants and it certainly was strange if it did not make some inquiry which led to a proper knowledge of the facts. The bank's own evidence shows that it bought these warrants, at least some of them, as early as 1899. The very fact that no one tried to enforce payment of any of these series of warrants tended to confirm the city officers in their belief that the warrants were not only invalid, but that even the warrant holders themselves believed so.

We submit then, that this judgment should be in such an amount and in such form that by its enforcement the city would have to pay no more than if payment of these warrants were enforced in a court of this state, excluding of course, the costs of suit from such consideration.

And if the city is to be held to its contract and must pay these warrants, then the warrant holders

should also be held to their agreement, and payment of them should be limited to the source it was agreed between the parties it should be limited before these warrants were issued, and without such agreement they never would have been issued.

We think this an important matter for the city and should receive the most careful consideration of the court.

Respectfully submitted,

U. D. Gnagey,

L. B. Stedman,

Attorneys for Plaintiff in Error.

No. 2835

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

TRANSCRIPT OF RECORD.

On Writ of Error to the District Court of the United States for the District of Oregon.

German Publishing Co., Portland.

No.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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INDEX.

Index. Page.

Index.

United States Circuit Court of Appeals for the Ninth Circuit.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error,

vs.

ELLA A. HUTCHISON,

Defendant in Error.

Names and Addresses of the Attorneys of Record:

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FRED OLSON, Endicott, Washington, and
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Board of Trade Building, Portland, Oregon,
for the Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth District.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Ella Hutchison,

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Willamette and Columbia River Towing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 14th day of July, in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,

Judge.

Filed July 14, 1916. G. H. Marsh, Clerk.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Citation on Writ of Error, is hereby accepted in Multnomah County, Oregon, this 14th day of July, 1916.

LOTUS L. LANGLEY,
Attorney for Ella Hutchison.

Filed July 14, 1916. G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America to the Judge of the District Court of the United States for the District of Oregon,

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Ella A. Hutchison, Plaintiff and Defendant in Error, and Willa-

mette & Columbia River Towing Company, a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 18th day of May, 1916.

G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon.

(Seal)

Service of the within writ of error made this 18th day of May, 1916, upon the District Court of the United States for the District of Oregon, by filing

with me as Clerk of said Court a duly certified copy of said writ of error.

(Seal) G. H. MARSH,

Clerk, United States District Court, District of Oregon.

Filed May 18, 1916.

In the District Court of the United States for the District of Oregon.

July Term, 1915.

Be it remembered, that on the 13th day of October, 1915, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

ELLA A. HUTCHISON,

Plaintiff.

vs.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff, and for cause of action against the above named defendant, alleges:

I.

That at all times hereinafter mentioned, defendand was and now is, a duly incorporated, organized and existing corporation, under and by virtue of the laws of the State of Oregon, and at all times

hereinafter mentioned, the owner of, and operating the same, as a common carrier of passenger and freight, for hire, a steamboat, known as the "J. N. Teal."

II.

That the plaintiff is the mother of R. Verne Hutchison, deceased, and under the laws of the State of Idaho, is the sole heir at law of said R. Verne Hutchison, deceased.

III.

That the plaintiff is now, and at all times hereinafter mentioned has been, a resident of the town of Endicott, State of Washington.

IV.

That the plaintiff brings this action as sole heir at law, under the statutes of distribution of the State of Idaho, of R. Verne Hutchison, deceased, and by virtue of section 4100 of the Revised Codes of Idaho, as prepared by John F. McLane, Code Commissioner.

V.

That at the date of death of R. Verne Hutchison, he was a resident of Endicott, State of Washington, was twenty-four years of age, and had a life expectancy of thirty-nine years.

VI.

That on May 3, 1915, while the steamboat "J. N. Teal" was in the Snake River, and docked at Lewis-

ton, Idaho, then being owned and operated by the defendant herein, R. Verne Hutchison was accepted by the defendant, thereon as passenger.

VII.

That said R. Verne Hutchison boarded said boat at first deck, and passed to the stern of said boat for the purpose of ascending to the upper deck. That for the purpose of using certain permanent stairs, generally used as a means of ascending and descending between the two decks, it becomes necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer. That while attempting to ascend said stairs aforesaid, the covering of said water-wheel broke through, letting said R. Verne Hutchison fall through said water-wheel into the water of the said Snake River, and said R. Verne Hutchison was thereby drowned.

VIII.

That defendant was careless, reckless and negligent in the manner following:

(a) That defendant failed to provide a safe landing of stairs from the first to second decks.

(b) That defendant failed to warn decedent not to use said stairs, or not to go upon the covering of said water-wheel.

(c) That by reason of the lack of warning or guards, and the presence of the stairs, with a board leading from the railing of the lower deck to the base of landing of said stairs on said water-wheel, defendant thereby held out an invitation to de-

cedent to go upon the covering of the water-wheel and use said stairs.

(d) That the covering of said water-wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used.

(e) That defendant allowed or permitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

(f) That no other stairs leading from first to second decks was provided on said boat.

(g) That the covering of said water-wheel had been allowed to deteriorate in strength.

IX.

That each and every act and omission of defendant, as set forth in the preceding paragraph, was reckless, careless and negligent, and was and were the proximate cause and causes of said R. Verne Hutchison's death, as herein set forth.

X.

That the said R. Verne Hutchison was an intelligent, healthy and industrious young man. That there existed as between this plaintiff and R. Verne Hutchison, a strong tie of affection. That in the death of decedent, plaintiff has been deprived of the care, society and companionship of said R. Verne Hutchison, to plaintiff's damage, in the sum of Twenty-five Thousand Dollars ($25,000).

WHEREFORE, Plaintiff demands judgment against said defendant for the sum of Twenty-five Thousand Dollars, together with her costs and disbursements herein.

FRED OLSON and
LANGLEY & LANGLEY,
Attorneys for Plaintiff.

State of Washington,
County of Whitman,—ss.

I, Ella A. Hutchison, being first duly sworn, depose and say: That I am the plaintiff in the foregoing action; that I know the contents of the foregoing complaint, and the same is true as I verily believe.

(Signed) ELLA A. HUTCHISON.

Subscribed and sworn to before me this 30th day of September, 1915.

(Signed) M. A. SHERMAN,
Notary Public for Washington.

(Seal)
My commission expires June 11th, 1919.

Filed October 13, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 15th day of November, 1915, there was duly filed in said Court, and Cause, an Answer, in words and figures as follows, to wit:

ANSWER.

Comes now the defendant in the above entitled action and for answer to plaintiff's complaint, defendant admits, denies and alleges as follows, to wit:

I.

Defendant admits paragraph 1 of said complaint.

II.

Defendant alleges that it is not sufficiently informed as to the truth or falsity of the allegations contained in paragraphs 2, 3, 4 and 5 of said complaint and therefore upon information and belief denies the same and the whole thereof.

III.

Defendant denies paragraphs 6, 7, 8, 9 and 10 of said complaint, and each and every allegation therein contained, except such allegations as are herein admitted, and defendant generally and specifically denies each and every paragraph, statement, matter, allegation and thing in said complaint contained and the whole thereof except such paragraphs and statements as are herein admitted and set forth.

For a first, separate and further answer and defense to plaintiff's complaint defendant alleges:

I.

That at all times herein mentioned the defendant was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and is the owner of a certain steamboat known as the "J. N. Teal."

II.

That on or about the 3rd day of May, 1915, the said steamer J. N. Teal, was at the boat landing at Lewiston, Idaho. That at said time, the deceased, R. Verne Hutchison, boarded said steamer J. N. Teal. That thereupon said R. Verne Hutchison proceeded to the stern of said steamer J. N. Teal, and said R. Verne Hutchison, deceased, carelessly and negligently went out and upon the covering of the wheel of said steamer J. N. Teal. That said R. Verne Hutchison had no right or authority to go out and upon said covering of said wheel and said R. Verne Hutchison went out and upon said wheel, contrary to orders and against the wishes of this defendant. That because of the carelessness and negligence of said R. Verne Hutchison, deceased, in going out and upon said covering of said water wheel, the said covering broke, and said R. Verne Hutchison was precipitated into the water, and thereby drowned. That said R. Verne Hutchison, deceased, was careless and negligent in failing and neglecting to heed the warnings and orders and instructions of this defendant, not to go out on said covering, said warnings were given by means of a posted notice near said wheel and by an employe named Mohler, and said R. Verne Hutchison, carelessly and negligently failed to use his senses and faculties. That it was not necessary for said R. Verne Hutchison to go out on said covering of said water wheel and there was ample room in other parts of said boat, where the said R. Verne Hutchison, deceased, could have gone with perfect

safety to himself, and so far as this defendant is concerned, said accident and injuries were wholly accidental and unavoidable and could not have been foreseen by the exercise of ordinary care.

WHEREFORE defendant having fully answered plaintiff's complaint prays that same be dismissed and that it have judgment for its costs and disbursements herein.

ED. MENDENHALL and
F. S. SENN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, W. E. Jones, being first duly sworn, depose and say that I am the secretary of the defendant in the above entitled action; and that the foregoing answer is true as I verily believe.

W. E. JONES.

Subscribed and sworn to before me this 11th day of November, 1915.

(Seal) F. S. FENN,
Notary Public for Oregon.

My commission expires July 24, 1916.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 11th day of November, 1915.

LOTUS L. LANGLEY,
One of Attorneys for Plaintiff.

Filed November 15, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 21st day of December, 1915, there was duly filed in said Court, and cause, a Replication in words and figures as follows, to wit:

REPLICATION.

Comes now the plaintiff in the above entitled action, and for reply to defendant's first separate and further answer and defense, admits and denies as follows, to wit:

I.

Plaintiff admits Paragraph I of said first separate and further answer and defense, and also admits that on or about the 3rd day of May, 1915, the said Steamer "J. N. Teal" was at the boat landing at Lewiston, Idaho. That at the same time the deceased, R. Verne Hutchison, boarded said steamer "J. N. Teal."

II.

Plaintiff denies each and every allegation, except such allegations as are herein admitted contained

in defendant's first separate and further answer and defense.

WHEREFORE, Plaintiff having fully replied to defendant's first separate and further answer and defense, prays for judgment as asked for in her complaint.

FRED OLSON and
LOTUS L. LANGLEY,
Attorneys for Plaintiff.

State of Washington,
County of Whitman,—ss.

I, Ella A. Hutchison, being first duly sworn, depose and say: That I am the plaintiff in the above entitled action, and that the foregoing reply is true as I verily believe.

ELLA A. HUTCHISON.

Subscribed and sworn to before me this 13th day of December, 1915.

(Seal) M. A. SHERMAN,
Notary Public for State of Washington.

My commission expires June 11, 1919.

State of Oregon,
County of Multnomah,—ss.

I, L. A. Recken, attorney for defendant, hereby admit due service of the within reply at Portland,

Oregon, on the 21st day of December, 1915, by delivery to me of a duly certified copy thereof.

SENN, EKWALL & RECKEN,
Attorneys for Defendant.

Filed December 21, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court, and cause, a Verdict, in words and figures as follows, to wit:

VERDICT.

We, the duly empanelled and sworn jury in the above entitled action, find for the plaintiff, and assess her damages at Five Thousand Five Hundred Dollars.

G. A. PLIETH,
Foreman.

Filed April 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 24th day of April, 1916, the same being the 43rd Judicial day of the Regular March, 1915, Term of said Court; Present: the Hon. Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

Now, at this day, come the parties hereto by their counsel as of Saturday; whereupon, the jury empanelled herein come into Court and return into Court their verdict, viz: "We, the duly empanelled and sworn jury in the above entitled action, find for the plaintiff, and assess her damages at Five

Thousand Five Hundred Dollars. G. A. Plieth, Foreman," which verdict is received by the Court and ordered to be filed; whereupon, it is considered that said plaintiff do have and recover of and from said defendant the sum of $5,500, together with her costs and disbursements herein, taxed at $227.75, and that she have execution therefor; and on motion of said defendant IT IS ORDERED that defendant be, and it is hereby allowed ten days from this date within which to file a motion for a new trial and thirty days within which to prepare and submit a bill of exceptions herein.

And afterwards, to wit, on the 18th day of May, 1916, there was duly filed in said Court, and cause, a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

The Willamette and Columbia River Towing Company, a corporation, defendant in the above entitled cause, feeling itself aggrieved by the judgment of the Court in the above entitled action, entered on the 24th day of April, 1916, by which it was adjudged that the plaintiff take judgment against this defendant in the sum of Five Thousand Five Hundred Dollars, and for plaintiff's costs and disbursements in the sum of $..... comes now by its attorney, F. S. Senn, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States

Circuit Court of Appeals, for the Ninth Judicial Circuit, under and according to the laws of the United States on that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error and your petitioner will ever pray.

ED. MENDENHALL and
F. S. SENN,
Attorneys for Defendant.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 18th day of May, 1916, the same being the 64th Judicial day of the Regular March, 1916, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

On the 18th day of May, 1916, came the above named defendant by F. S. Senn, its attorney, and filed herein and presented to the Court, its petition praying for the allowance of a writ of error, intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the ..... day of April, 1916, duly authenticated, may be sent to the United States Circuit

Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may appear proper in the premises.

ON CONSIDERATION WHEREOF, the Court does hereby allow the said writ of error and that citation issue as by law provided.

IT IS FURTHER ORDERED that the amount of the supersedeas bond to be given by said defendant be and the same is hereby fixed at the sum of seven thousand dollars with good and sufficient surety to be approved by this Court, which bond now being filed with Daniel Kern and F. B. Jones, as sureties, is hereby approved and execution issued herein is recalled and stayed.

Dated May 18th, 1916.

R. S. BEAN,
Judge.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of May, 1916, there was duly filed in said Court, and cause, a Supersedeas Bond, in words and figures as follows, to wit:

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That the Willamette & Columbia River Towing Company, a corporation, as principal and Daniel Kern and F. B. Jones as sureties, are held and firmly bound unto Ella A. Hutchison, in the sum of seven thousand dollars, to be paid to the said Ella

A. Hutchison, for the payment of which well and truly to be made, we bind ourselves, our successors, executors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of May, 1916.

WHEREAS, the above named Willamette and Columbia River Towing Company, a corporation, has applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered in the above entitled cause by the District Court of the United States, for the District of Oregon.

NOW THEREFORE, the condition of this obligation is such that if the said Willamette & Columbia River Towing Company, shall prosecute said writ to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY,

By W. E. Jones, Secretary & Treasurer,
Principal.

Daniel Kern,
F. B. Jones,
Sureties.

(Corporate Seal)

State of Oregon,
County of Multnomah,—ss.

We, Daniel Kern and F. B. Jones, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and free holder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or other officer of any Court, and am worth the sum of Fourteen Thousand Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

DANIEL KERN,
F. B. JONES.

Subscribed and sworn to before me this 8th day of May A. D. 1916.

(Seal) F. S. SENN,
Notary Public for Oregon.

My commission expires July 24, 1916.

Approved this 15th day of May, 1916.

R. S. BEAN, Judge.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Bond is hereby accepted in Multnomah County, Oregon, this 8th day of May, 1916.

LOTUS L. LANGLEY,
One of the Attorneys for Plaintiff.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3rd day of June, 1916, there was duly filed in said Court, and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Comes now the Willamette and Columbia River Towing Company, a corporation above named and in connection with its petition for a writ of error in the above entitled action, alleges, that there was error on the part of the District Court of the United States for the District of Oregon in regard to matters and things hereinafter set forth, and the defendant thereupon makes this, its assignment of errors:

ASSIGNMENT OF ERROR No. 1.

That the Court erred in overruling defendant's objection to the testimony of Dell Wilson, which was objected to by defendant, said testimony being as follows:

Q. State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

MR. SENN: Just a minute. Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point

that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the huricane deck, and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to have applied to the day of the accident.

MR. LANGLEY: If your Honor understands me. I don't mean by that that I am attempting to say that there was posted notice, by the depositions; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this acicdent—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (continues reading deposition): State whether or not on this trip you were on the hurricane deck of the boat? A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to, state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did, I saw women and the band boys and men too, that I don't think were employed by the boat.

Q. If you testify you saw other persons than those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fifteen, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty.

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

ASSIGNMENT OF ERROR No. 2.

That the Court erred in overruling defendant's objection to the testimony of Ella A. Hutchison, which was objected to by the defendant, said testimony being as follows:

* * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son R. Verne Hutchison?

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

THE COURT: Very well, you will be allowed an exception.

ASSIGNMENT OF ERROR No. 3.

That the Court erred in overruling defendant's motion for a directed verdict, said motion being as follows:

"Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground that there has not sufficient evidence been introduced to submit to the jury, and second the evidence shows that the deceased took this position voluntarily, without orders or directions from anyone and was guilty of contributary negligence.

COURT: Very well; the Court will overrule the motion.

MR. SENN: And allow an exception?

COURT: You may have your exception.

ASSIGNMENT OF ERROR No. 4.

That the Court erred in refusing to instruct the jury as follows:

"It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers

who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the wheel in good condition, provided this covering of the wheel was not intended to be used as a passage-way by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering, of the wheel, and your verdict must then be for the defendant company."

ASSIGNMENT OF ERROR No. 5.

That the Court erred in refusing to instruct the jury as follows:

"There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find

that the company had provided a ladder or stairway from the second to the hurricane deck and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead, walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant."

ASSIGNMENT OF ERROR No. 6.

That the Court erred in refusing to instruct the jury as follows:

"You must first consider whether or not the defendant company has been negligent, and whether the defendant compay is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corpo-

ration should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss, if any, which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of deceased."

ASSIGNMENT OF ERROR No. 7.

That the Court erred in instructing the jury as follows:

"Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the acident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then wou will determine whether, under the conditions and circum-

stances, the way was properly protected so that people would not get into danger. Determine, first whether it was dangerous to go upon this covering and then, second, whether it ought to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises."

SENN, EKWALL & RECKEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 3rd day of June, 1916.

LOTUS L. LANGLEY,
One of Attorneys for Plaintiff.

Filed June 3, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of June, 1916, there was duly filed in said Court, and cause, a Bill of Exceptions, in words and figures as follows, to wit:

BILL OF EXCEPTIONS.

Portland, Oregon, April 21, 1916, 10 o'clock a m.

BEFORE HON. CHARLES E. WOLVERTON,
JUDGE AND JURY.

Now, at this time, this cause comes on for trial be-

fore the Honorable Charles E. Wolverton, Judge of the above entitled Court, and jury, the plaintiff appearing by Lotus L. Langley, Manche Langley and Fred Olsen, her attorneys, and the defendant appearing by Mr. F. S. Senn, its attorney.

Whereupon the following proceedings were had:

MR. SENN: I would like to say to your Honor, that the J. N. Teal is now at the foot of Taylor Street, and after the opening statements I presume that would be the proper time, we would like to have the jury go down and view the boat.

COURT: Any objection to that?

MR. LANGLEY: I have no particular objection to that; however, we have pictures that show the portion of the boat that will be material in the matter and I think that there could be no question as to the correctness of the pictures, but if the Court is of the feeling that it will aid the jury in understanding the physical conditions I certainly have no objections.

COURT: The view of the boat might aid the interpretation of the pictures.

MR. LANGLEY: Yes, that is right.

COURT: I think the Court will allow it, and when you have made your statement to the jury, the Court will give directions so that the jury may view the boat.

MR. LANGLEY: I would like to ask the Court to insert the name of "River" in the corporation name of the defendant. It was inadvertantly omit-

ted. It is agreed by the attorney that that might be inserted.

COURT: Very well.

(Opening Statements).

Whereupon proceedings herein adjourned to 2 P. M.

Portland, Oregon, April 21, 1916, 2 P. M.

MR. LANGLEY: I wish to introduce the deposition of Mrs. TIFFT.

(Reads deposition of Laura E. Tifft to jury.)

MR. LANGLEY (reading): "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to. A. That is the way it looked to me." (Continuing) I have the picture here and I would like to introduce it in evidence.

Picture marked PLAINTIFF'S EXHIBIT 1.

MR. LANGLEY: Gentlemen, you can pass that along.

MR. SENN: Just a minute, I understand the offer is merely for identification.

MR. LANGLEY: I will offer it in evidence.

MR. SENN: Is there anything, Mr. Langley, as to when this picture was taken? Do you know when it was taken?

MR. LANGLEY: I could tell when it was taken, but I don't understand that that would be neces-

sary for the purpose of introducing it in evidence so long as it shows the condition that existed at that time.

COURT: Who took the picture?

MR. LANGLEY: The picture was taken by a young gentleman in Endicott. I think in a day or two following this occurrence. The question that I have asked the lady is this: "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat J. N. Teal in every detail and particular as the same existed." She has previously testified that she was there at the stern of the boat at the time of the cry of "Man overboard."

COURT: You say this picture was taken a day or two after?

MR. LANGLEY: It was taken a day or two after, but I am saying that that picture shows the conditions that existed at that particular time. I could not bring the photographer here.

COURT: Let me see the picture.

MR. SENN: I don't believe we will object to it, Your Honor.

COURT: Very well, let it go in. Let me see it. (Inspects picture.)

MR. LANGLEY: Gentlemen, you can just pass that along and look at it. (Continues reading): "State whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck of said boat, or not

to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not."

MR. SENN: That was objected to, Your Honor, and I think the objection might be well taken on this ground, as I understand this lady did not go to the hurricane deck, did not attempt to go to the hurricane deck, she was simply one of the passengers of three hundred or three hundred and fifty, and I think the fact that she didn't try to go there, made no effort to go there, that she was not told to go there would not be any evidence in this case.

COURT: She was one of the passengers on the deck?

MR. SENN: Yes.

COURT: She was on the passenger deck?

MR. SENN: She was on the passenger deck, but as I understand made no effort to go to the hurricane deck.

COURT: I understand, but she was there; I think I will admit the testimony.

MR. LANGLEY: That completes the deposition of Mrs. Tifft.

I introduce in evidence the deposition of G. V. Barker.

(Reads deposition of G. V. Barker.)

MR. LANGLEY (reading): "I hand you a picture marked for identification 'H. L. W. No. 2' "—First, however, I wish to offer the first picture, No. 1 in evidence.

COURT: Very well.

MR. SENN: We will object to that picture. Your Honor, as I understand in the deposition it wasn't offered in evidence, merely marked for identification. I think at the time of the taking of the deposition they should have offered it in evidence and without introduced at that time they cannot introduce it now. Second, that this appears to be a picture taken the day before the accident, when the conditions might not have been the same, or are different, and I think for that reason it would not be admissible.

COURT: I presume it is to show the matter of the boat; that is, the construction and form of the boat, is that what it is introduced for?

MR. SENN: It does not show that at all.

MR. LANGLEY: It is not for that purpose.

COURT: I will sustain the objection.

MR. LANGLEY: That is all.

MR. SENN: We raise the same objection to this picture. The same thing.

MR. LANGLEY: That is all of that deposition. (Reads deposition of Dell Wilson.) Reading: "State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were."

MR. SENN: Just a minute, Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to be applied to the day of the accident.

MR. LANGLEY: If Your Honor understands me, I don't mean by that that I am attempting to say that there was posted notice, by the deposition; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck. I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (continues reading deposition): "State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip.

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water-house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and the band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify you say other persons than those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fiften, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons

than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty."

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

MR. LANGLEY (reading): "State whether or not there were notices posted—

COURT: Before you read the answer—

MR. LANGLEY: —near the water-wheel of said boat or on said boat at all giving warning not to go out on the covering of the water-wheel, or not to go to the hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do, or referred to the use of the stairs from the covering of the water-wheel to the upper or hurricane deck."

COURT: I think you ought to confine that ques-

tion to the day of the accident, or questions of that nature.

MR. LANGLEY: Does Your Honor understand that this was the same day?

COURT: I thought it was the day before.

MR. LANGLEY: No, this man was taking a ride the morning of the same day.

COURT: How long before the accident?

MR. LANGLEY: Well, I think that he could not have been more than an hour—I think the deposition will show.

COURT: I will hear the testimony then; I will overrule the objection.

MR. SENN: Not the same trip, Your Honor, a different trip.

COURT: Yes, I understand; it is so near the time I will permit that to go to the jury.

MR. LANGLEY (finishes reading deposition): I read the deposition of John Bostock (reads deposition). Reading: State whether or not on this trip you were on the upper deck of the boat."

MR. SENN: I think, Your Honor, counsel ought to read the objections that are made as we go along, so that the record will show.

MR. LANGLEY: There are no objections here noted in this deposition at all, there was no objection.

MR. SENN: There were objections in all the other depositions that were not read by counsel.

COURT: There is no need to take up the time of the Court in reading the objections unless you in-

sist on the objections, and if you insist on the objection the Court will hear you.

MR. SENN: Yes.

MR. LANGLEY (reading): If your answer is that you were on the upper deck of the boat on previous trip on May 3, 1915, state by what stairs, if any, you ascended to the upper deck."

MR. SENN: Now, at this time I will object on the ground it is irrelevant, immaterial and incompetent.

COURT: The objection will be overruled. You may proceed.

MR. LANGLEY (completes reading of deposition.) The deposition of Gottfried Herbst. (Reads.) The deposition of Miss Lowrey. (Reads deposition of Mertice Lowrey.) The deposition of Hazel Armstrong. (Reads deposition of Hazel Armstrong.) The deposition of L. R. Stebbins. (Reads deposition of L. R. Stebbins.) The deposition of Mrs. C. E. Stebbins. (Reads deposition of Mrs. C. E. Stebbins.) The deposition of Dr. J. Floyd Tifft. (Reads deposition of Dr. Tifft.) "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular as the same existed at the time above referred to.

A. Yes, with the exception of the steps, which appear heavier." I think that I will ask to offer that picture in evidence at this time. It is exactly the same picture as Mrs. Tifft identified.

MR. SENN: No objection.

Picture marked Plaintiff's Exhibit 2.

MR. LANGLEY (completes reading of Dr. Tifft's deposition.) I think that is all the depositions, with the exception of the deposition of plaintiff in the case, and that is quite lengthy. I assume that the jurors are tired of depositions and I would like to ask the privilege of introducing that latter in the case.

RANDALL RAY TUTTLE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Your name is what?

A. Randall Ray Tuttle.

Q. And where do you reside?

A. My present address is Spokane.

Q. What is your occupation?

A. I teach bands.

Q. Where were you May 3, 1915?

A. I was in Lewiston with the college band.

Q. What position did you have with the band?

A. I was military captain of the band and assistant director.

Q. Were you aboard the boat J. N. Teal May 3, 1915?

A. I was.

Q. I wish you would in your own language, Mr. Tuttle, state from the time that you started to go

aboard to the time of the accident of Mr. R. Verne Hutchinson—what you observed and what your movements were?

A. We formed a line on the bank, and walked up the plank—or the gang plank to the boat. I was given the pass by Mr. Herbst and I showed this to a man—to an officer who was taking the tickets.

Q. Just a moment there before you proceed further, Mr. Tuttle, I hand you a card, Mr. Tuttle, as found in the deposition of E. D. Potvin, and ask you if you have ever seen that card before?

A. That is the pass that I had, I showed at the gang plank.

MR. LANGLEY: I will ask to introduce that in evidence.

COURT: A pass on the boat?

A. A pass to the boat.

COURT: To the boat.

MR. SENN: We have no objection to the pass.

Pass marked PLAINTIFF'S EXHIBIT 3.

Q. What did you do with the card that I have just handed you, on your going on to the boat?

A. I showed the card to the officer and then kept it. He told us to go on and go to the top deck. I kept the card.

Q. The captain of the boat didn't take up the card?

A. The officer to whom I showed the card didn't take it.

Q. Now, just another preliminary question. Did you see anyone using the stairs leading from the cov-

ering of the water wheel to the hurricane deck before you went aboard of the boat.

A. While I was on the shore, I saw the Kamiah band come down by that way.

Q. About how many was there in that band?

A. I should judge there was between twenty and thirty.

Q. That is another band, as I understand, than the band that you belong to?

A. Yes.

Q. Was that a band that was on a previous trip on the boat?

A. They were on the trip just preceding the one which we were to go.

Q. I will ask you to state to the jury, if you will, Mr. Tuttle, whether there were people on the upper deck of the boat—the hurricane deck at the time you went aboard?

A. I saw people coming down from there when we were on the shore; as to whether there were or not when I went aboard, I am not sure whether there were still people or not, I don't know.

Q. Now, you can, in your own language—well, just another question, Mr. Tuttle, was there chairs on the hurricane deck at the time that the band had come down from the upper deck?

A. Yes, there were.

Q. How many chairs were there there?

A. The entire Kamiah band was seated as they came down the river, before landing.

Q. Were the chairs left there at the time that you started to go aboard?

A. They were, yes.

Q. Now, you may state to the jury in your language, Mr. Tuttle, the movements of yourself and your companions from the time that you started to go aboard until the occurrence of this accident.

A. We formed a line, single file, and walked up the plank. I showed the pass to the officer, he told us to go to the top deck and then we went on. We went on to the side of the boat that was next to the shore, up the stairway to the passenger deck—the first passenger deck, from there we walked straight back to the plank that goes over to the wheel-house and were out on the wheel-house some of us, just preparing to go up the stairs when the crash came. I don't know what the other boys did after that, they were right near there because I fell toward the boat and crawled over the railing back onto the deck.

Q. I will ask you, Mr. Tuttle, whether or not there is a ladder that leads from the side of the deck on the side that you and your companions entered on, from the second to the upper or hurricane deck?

A. There was no ladder on that side.

Q. Have you examined the boat today?

A. I have, yes.

Q. Did you see an iron ladder there today?

A. Not on that side.

Q. How is that?

A. Not on the side of the boat which we boarded.

COURT: Did the officer tell you how to go that time?

A. No, I think not; he told us to go to the upper deck—go to the top deck.

Q. Then, if I understand you correctly, the side that you went in on there was no ladder from the second to the upper deck?

A. No, there was no ladder.

Q. The side that you saw the ladder on today is on the opposite side of the side that you went in on?

A. Yes, it it.

Q. Now, I wish you would tell the jury whether or not there were notices any place about the boat which you saw was a warning not to go out on the covering of the water-wheel or a warning of any character?

A. I saw no notices to that effect at all.

Q. I wish you would state whether or not there was any guard there that was giving verbal warning of any character?

A. There was not.

Q. Now, did you examine the place where Mr. Hutchison fell through the cover of the water-wheel after this occurred?

A. Yes, I went back and examined it after three or four hours.

Q. I wish you would state to the jury what the result of your examination was, as to whether or not the break and the material that was examined indicated a decayed condition of the cover of the water-wheel?

A. The break in the flooring or ceiling, whichever the top is of, indicated that that was badly decayed. It was discolored and broken square off, the rafters or the circular pieces on which that was fastened were also very badly discolored and they were more or less squarely off, not splintered. I would say from looking at it it was decayed.

Q. Can you inform us about where you were standing at the time that Mr. Hutchison fell through the covering?

A. I was at the wheel-house—on the wheel-house near the ladder. I should judge hardly more than a foot from the ladder—from the stairs.

Q. Were there other passengers using the stairs at the time?

A. There were, yes.

Q. Was that your reason for not going up the stairs, at the time?

A. Yes, it was.

Q. Now, I wish you would state to the jury, Mr. Tuttle, whether there was any element of rowdyism there upon the part of any of the passengers that was then on the cover of the water-wheel?

A. There was none whatever that I noticed.

Q. Was there any jumping or scuffling or tussling among the members of your party or any other party that was on the cover of the water-wheel at the time that this occurred?

A. No, there was not.

MR. LANGLEY: I think that is all.

CROSS-EXAMINATION.

Questions by Mr. Senn:

Mr. Tuttle, did you hear the deposition read a minute ago of one of the band boys who said he jumped up and down on the wheel and nobody told him to stop it?

A. That wasn't a band boy.

Q. Mr. Bostock was another fellow, he didn't belong to the band.

Q. Was he there at the time?

A. I remember having seen him in Lewiston that day.

Q. You saw him do that?

A. No, I didn't see him.

Q. You didn't see him.

Q. How many of you boys were on the covering of the wheel at the time it broke through?

A. I should judge six or eight.

Q. And besides you boys, how many others were there, passengers besides you?

A. I should judge six or eight altogether.

Q. But practically all of them were band boys?

A. There were one or two women.

Q. Now, how did you get to the covering of that wheel, over the railing?

A. Yes, there is a step, a seat below the rail, step to that from that to the rail and walk out on the plank.

Q. Did you climb over the railing or did you follow the plank walk?

A. Followed the plank walk going there.

Q. And instead of taking the stairs to the right and going to the hurricane deck as you could have, you went out on the wheel-house?

A. Stepped on the wheel-house preparing to go up the ladder, up the stairs.

Q. I will ask you to examine this picture and state whether or not that is a true representation of the condition there at the time of this accident.

A. As I remember it the other plank was lower.

Q. Well, is that substantially correct?

A. Well, there is a plank there, but it reaches higher toward the top of the wheel-house than in my recollection the other plank was, as the picture is making it easier to step onto the stairs.

Q. I will hand you Plaintiff's Exhibit 1 and ask you whether that is correct as has been testified to here in the depositions as being a correct representation of the conditions there?

A. This seems to be nearly correct.

Q. Well, now, what was to prevent you from stepping off the plank onto the stairway and going to the hurricane deck?

A. I possibly could have done it.

Q. But instead of that you went out on the wheel covering, six or eight of you?

A. I stepped onto the wheel covering.

Q. And six of eight of the other boys did?

A. I think there were six or eight altogether, other passengers and—

Q. You formed on the bank in single line, did you, the boys?

A. Single line, yes.

Q. And did you march down to the boat Indian style?

A. We walked up the plank in that manner.

Q. In Indian style.

A. Then we broke rank.

Q. Did you go on the boat lockstep or college style?

A. No—well, we walked up the plank single file and was together while he—because he was taking other tickets at the same time and just as soon as we got off the plank we broke our rank.

Q. And you all marched back to the back end?

A. No, we broke ranks at the end of the plank and walked back to the back end.

Q. Where did the rest go that didn't come to the back end?

A. They were on the way, I presume.

Q. You were all together there?

A. Most of the band was on the boat.

Q. Well, you all went to the back end of the boat together, did you not?

A. We were not in a body; we broke and mixed with the other passengers.

Q. You say there was no one there who told you not to go on the wheel covering?

A. Yes, there was no one.

Q. And there was no one there who told you to go on the wheel covering, was there?

A. No, I think not.

Q. You went there of your own accord?

A. Yes.

Q. Onto the covering of the wheel?

A. We went where we had seen the others come down.

Q. Was it a wet day or was it sunshiny?

A. As I remember, the sun was shining.

Q. That covering is rounded, hood-shaped, is it not?

A. Yes sir.

Q. You could have stepped from the plank right onto the lader and gone up to the hurricane deck?

A. Yes, it would have been possible, I believe, by a right angle turn.

Q. But instead of that six or eight of you went out on this hurricane deck, or on this wheel covering?

A. I stepped on the wheel covering, yes, before going further.

Q. And Mr. Hutchison did the same?

A. I think he did, yes.

Q. Well, what were you all doing out here on this wheel covering?

A. We were intending to go on up the stairs when we could.

Q. Why didn't you go on up the stairs when you walked across the plank?

A. We were waiting for other people to go up; there was a lady on the stairs, as I remember it.

Q. Well, you could have gone from the plank right up the stairs, couldn't you?

A. We could have, I presume, by making a sharp turn.

Q. Well, you must have gone out on that covering for some purpose; what was it?

A. In order to get to the hurricane deck by means of the stairs.

Q. What was it?

A. It was easier to go up the stairs that way than to make a right angle, turn clear around.

Q. You mean to say that six or eight of you walked across the plank and took your position on the covering of wheel and waited there until a lady has ascended the stairs and then you were going—

A. My own position—I went—walked out on the plank, stepped onthe wheel-house and was preparing to go up the stairs as soon as I could.

Q. Was Mr. Hutchison ahead of you?

A. No, he wasn't.

Q. Did he come right behind you?

A. He must have, I was ahead.

Q. Was he further out on the wheel-house than you?

A. I could not say as to that.

Q. Did you have any friends or leave any people on the shore?

A. I don't know. There were lots of people there, but I don't think anyone that I—

Q. Did you have any band instruments with you?

A. We did not.

Q. You had nothing with you at all?

A. No.

Q. I will show you this picture and ask you

whether or not that is not a substantially correct representation of the condition of the wheel and the steps and the stairs at the time of this accident?

A. I believe it is about correct.

MR. SENN: I will offer it in evidence, Your Honor.

MR. LANGLEY: We have no objection.

Picture marked DEFENDANT'S EXHIBIT 1.

Q. Now, will you just step in front of the jury, Mr. Tuttle?

A. (Witness does so.)

Q. Now, did you say that all of you six or eight boys came over this plank?

A. I say that I did; I am not sure as to the rest.

Q. Isnt' it a fact that a good many of them clambered over the railing?

A. If they did, I didn't know it.

Q. Would you say that they didn't or that they did?

A. They may have, I don't know whether they did or not.

Q. You walked across this plank and then walked out on this hood?

A. I walked across this plank and came out here.

Q. Was there anything to prevent you from stepping from this plank right up the stairs onto this deck?

A. Rather a difficult feat.

Q. Rather a difficult feat for a young man your age?

A. Well, rather inconvenient.

Q. Now, wasn't it a fact that you boys all jumped out on this covering and had a little lockstep?

A. No, we didn't.

Q. You were celebrating at the time the opening of the canal, were you not?

A. That was our purpose in coming to Lewiston.

Q. You came from Pullman?

A. Yes sir.

Q. And a great many other people came to Lewiston?

A. Yes sir.

Q. And you were celebrating that day, were you not?

A. That is what we came for, to help in the celebration.

Q. You mean to say that it was easier to walk out across this plank out on this hood and then step from the hood onto the stairs?

A. It was easier to step from the plank to the hood and from the hood to the stairs than to turn directly around and walk up there.

Q. Now, you were standing next to the stairs, you say?

A. As I remember it, I wasn't more than a foot from the stairs.

Q. Was there anyone between you and the stairs?

A. There was, as I remember, there was a woman going up the stairs.

Q. In fact, while you stood there she came across the plank and walked up the stairs?

A. No, I think she was preparing to go up already—I imagine she was on the wheel-house when I was coming across.

Q. Where were these other boys standing, along here on the center of the wheel house?

A. I was the first one across; I don't know just exactly where they were standing.

Q. You may take the chair.

A. (Witness does so.)

Q. Now, you say, that a few minutes or an hour or so you went back there to examine this place where Mr. Hutchison fell through?

A. After two or three hours I went back, yes.

Q. What tempted you to go back, what was your idea?

A. I wanted to look the matter over and see why it broke.

Q. Have you any reason why you should go back and examine that place?

A. Why, I of course was interested in it; I wanted to see what was the matter, why it went through.

Q. Did anybody tell you to go back?

A. No one told me to go back.

Q. Went back of your own accord?

A. Yes sir.

Q. Did you see Dr. Tifft there at the same time examining the wheel-house?

A. I didn't know Dr. Tifft at the time; I met him at the hotel that evening.

Q. Did you see anybody else back there examining it?

A. My father went back with me.

Q. And you went back of your own accord?

A. Yes sir.

Q. This accident happened about what time of day?

A. I don't remember just what the time was.

Q. Don't know whether it was forenoon or afternoon?

A. In the afternoon.

Q. In the afternoon, about what time?

A. I could not say exactly what time it was.

Q. Was it before or after the middle of the afternoon?

A. I should think it was about the middle of the afternoon, possibly a little before.

Q. How long after did you go back to examine this place that broke?

A. Two or three hours.

Q. I will hand you this picture and ask you whether you ever saw that stairway.

A. I saw that today, I think.

Q. Didn't see it on the day of the accident?

A. Yes, I saw it when I came back this iron stairway.

Q. When you went back to examine the boat?

A. Yes.

Q. You saw it then. Is that a correct representation of that stairway on the day that you went back there and examined—or substantially correct?

A. All but the sign, I don't remember of having seen the sign.

Q. You don't remember of seeing any sign?

A. Yes.

MR. SENN: We will offer it in evidence, Your Honor, if there is no objection.

COURT: Any objection?

MR. LANGLEY: No, we have no objection.

COURT: Very well, let it be offered. Does that purport to have a sign there?

MR. LANGLEY: Yes.

MR. SENN: With the exception of the sign.

Picture marked DEFENDANT'S EXHIBIT 2.

Q. Now, after you passed across the gang-plank did you go straight to the back end of the boat?

A. Yes, I went up the stairway to the next deck and from there to the back of the boat.

Q. Along which side of the boat did you go back, the right hand or the left hand?

A. The side near the shore.

Q. Which side was that, looking toward the bow?

A. The bow is the front of the boat?

Q. Yes, the bow is the front of the boat.

A. Looking toward the bow.

Q. Yes.

A. That would be the right side, looking toward the bow.

Q. Looking toward the bow. How many of the other boys went along that way or do you know which way they took?

A. We broke ranks when we got on the boat.

MR. SENN: That is all.

RE-DIRECT EXAMINATION.

Q. Do you know, Mr. Tuttle, whether or not the gentleman, Mr. Bostock, whose deposition has been read here, was on the boat at the time that this occurred or whether his testimony is directed to a previous trip of the boat?

A. I don't know whether he was on the boat at the time or not, but I merely saw him in the town.

Q. You merely saw him in the town?

A. In Lewiston that day.

Q. If he was on the covering of the water-wheel at the time that you members of the band were on the covering you don't know of it?

A. No.

Q. And would you have been likely to have seen him if he had been there at that time, do you think?

A. I think I would have directly afterwards. I saw most of the boys afterwards.

Q. Is he a member of your band?

A. No, he is not.

Q. Was he at that time or at any time?

A. No, he never was.

Q. Now, as I understand, Mr. Tuttle, you were about the first one to come on the covering of the water-wheel, of the band?

A. Yes.

Q. And as I understand you, there was a lady that was going up the stairs at that time?

A. That is my recollection.

Q. And was that your reason for not going up the stairs at that time?

A. That was why I was waiting, yes.

Q. And the others that came on behind you, those members of the band, which Mr. Hutchison was one, did they come on after the time that you had passed to the base of the stairs?

A. After the time I was on the wheel-house or the base of the stairs?

Q. Yes.

A. I think they must have, I was at the head.

Q. You are quite positive that you were the first one of the band boys to come onto the covering of the water-wheel?

A. I am quite sure of that, yes.

Q. And you would not be able to tell us how far back of those that were coming on, of the band boys, Mr. Hutchison was, would you?

A. No, I could not be positive of that.

Q. I believe you testified in your direct examination, Mr. Tuttle, that you were told to go to the upper or top deck; is that correct?

A. Yes, that is correct.

Q. Who told you that?

COURT: He has been over that.

MR. LANGLEY: That is all.

COURT: Can you point out on that picture the first one offered about where Hutchison fell through that deck?

MR. SENN: Defendant's Exhibit 1?

COURT: Yes.

A. I could judge only from the hole I saw afterwards.

COURT: Very well.

A. I should say about there.

COURT: Make a mark there, a cross with your initials.

A. (Witness does so.)

MR. LANGLEY: We would have gone into that, Your Honor, but the jury was given the place this morning.

COURT: Very well.

A. That in my estimation is about the place.

COURT: About how far away from the foot of the stairs?

A. That would be about three feet I imagine.

COURT: That is all; I wanted to know for my own information.

(Witness excused.)

PAUL H. DUPERTUIS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Where do you reside, Mr. Dupertius?

A. Abner, Washington, at the present time. However, I am in Pullman.

Q. What are you doing at the present time?

A. I am a student at the college.

Q. What position in the student body do you occupy or have?

A. I am President of the associated students.

Q. What was it that you said?

A. President of the associated students.

Q. And where were you on May 3, 1915?

A. Lewiston, Idaho.

Q. What were you doing there?

A. I was a member of the college band.

Q. Were you aboard the boat J. N. Teal on May 3, 1915?

A. Yes sir.

Q. I wish you would tell the jury the manner in which you went aboard and what occurred up to the time of R. Verne Hutchison breaking through the covering of the water-wheel.

A. We went on board the ship over the gang plank in single file and climbed the steps to the second deck, walked back to the back of the boat and were going up on the third or top deck. We went over the banister, on the gang plank, onto the wheel-house; a lady was following me and there was a lady going up the stairs at the time, and we stepped to the side to let these people by. We had been on there only a few imnutes, perhaps a minute or two, when the crash came, and the roof of the wheel-house was torn from under us. I had one foot on the solid board, Mr. Hutchison, who was standing by my side, fell through, and my first thought was to grab him and I tried to catch him and at that time this lady who was following me was standing on this gang

plank, fell at my feet towards me, right towards the hole that was made and instinctively I grabbed her by the arm and threw myself onto the boat and took hold of the railing and held her until people on the boat pulled us up.

Q. Were there any notices about there not to go upon the covering of the water-wheel, or any notices of any sort?

A. I didn't see them.

Q. Did you examine the condition of the timber after the break?

A. Yes sir.

Q. State to the jury what condition you found that in.

A. The rafters, as I call them, were without question rotting, they were dark in color, the break was similar to a break in bark. It didn't splinter off as new timber does.

Q. Was there any guard there giving you a verbal warning not to go out there?

A. There was not.

Q. Was there anyone to tell you where to go or what deck to go to when you went aboard the boat?

A. The instructions to Mr. Tuttle, our leader, was to go up to the top deck.

Q. Did you hear that instruction?

A. He gave it to us.

Q. Have you been on the boat today?

A. Yes sir.

Q. State to the jury whether or not the iron ladder that leads from the second deck to the top deck

was on the same side of the boat that you were on or on the opposite side?

A. There was no ladder on the same side of the boat that we went on, it was on the opposite side as I noticed today.

Q. Do you know Mr. Bostock?

A. Yes sir, slightly.

Q. Was he on the covering of the water-wheel at the time that this trip was being made or started?

A. I didn't see Mr. Bostock on the boat at all.

Q. I wish you would state to the jury whether there was any tussling or jumping about the boat by anyone that was on there?

A. There wasn't any at all, we were a military band, under military orders and there was no tussling at all.

Q. I wish you would state what your reason was for not going up the ladder at the time that you went out on the plank?

MR. SENN: I object to that as irrelevant, immaterial and calling for the conclusion of the witness.

COURT: I will overrule the objection.

A. There was a lady going up the stairs and it was impossible to get up until she had gone. Then there was the lady following me and the natural thing for me to do was to let the lady get by first, and I waited my turn.

Q. And as I understand, Mr. Hutchison was standing by your side at the time?

A. Yes sir.

Q. How far back in the line do you think that you were, of the band boys that were getting on at that time?

A. About—perhaps fifth or sixth, somewhere in there, I can't say exactly; near the front, however.

Q. I wish you would state whether or not you saw the band that was previously on the boat come from the upper deck?

A. Yes, sir, I did.

Q. How did they descend?

A. Down the ladder over the wheel-house.

Q. I wish you would state to the jury whether there were chairs on the upper deck at the time that you were attempting to board?

A. There were, the band was all seated.

Q. I will ask you to state to the jury whether or not you saw a notice posted on the boat this morning?

A. Yes sir.

Q. Was that notice there May the 3rd, 1915?

A. I didn't see it.

MR. LANGLEY: I think that is all.

CROSS-EXAMINATION.

Questions by Mr. Senn:

You went on the covering of the wheel this morning?

A. Yes sir.

Q. And showed the jury where Mr. Hutchison was standing?

A. Yes sir.

Q. And that is correct as you showed the jury this morning?

A. Approximately, yes sir.

Q. Now, as I understand, Mr. Hutchison was about the farthest out on the wheel covering?

A. By my side, yes.

Q. One of your feet was on solid boards, I believe, or rafters?

A. It didn't feel very solid, but it held me.

Q. It held you?

A. Yes sir.

Q. From there on to the ladder it was solid?

A. Yes sir.

Q. Is that true?

A. Well, it broke down, but then it didn't go clear in.

Q. Well, from the place where you showed the jury this morning that your foot was, to the ladder, that part didn't break through?

A. It broke down, but it didn't break through.

Q. Strong enough to hold you, so that it kept you from going through?

A. If I had stayed, I would have fallen, because I did pitch as it broke down.

Q. Mr. Hutchinson was the only one that fell through, as I understand?

A. As far as I know.

Q. Now, how many other boys were out on this covering?

A. There were perhaps six or eight people.

Q. Mr. Bostock, where did you become acquainted with him?

A. At Pullman.

Q. Is he a college student there?

A. He was.

Q. Was a student at that time.

A. I am not sure, I don't know.

Q. You knew him at college?

A. Just passingly.

Q. Came over to Lewiston with you?

A. Yes.

Q. Do you know any of the other band boys?

A. Yes sir, I know the band boys.

Q. You heard his deposition in which he said he jumped up and down on this covering?

A. Yes sir.

Q. Did you see him do that?

A. No, sir.

Q. He knew all you boys?

A. Not all, I don't think.

Q. And of course you boys stayed together, you were celebrating?

A. He wasn't with us at all.

Q. He wasn't with you at all, who was he with?

A. I don't know.

Q. You say there were chairs on the hurricane deck for the band?

A. Yes sir.

Q. There were no chairs for anyone else, was there?

A. I don't know.

Q. You didn't see any other chairs for anyone else?

A. The band was all seated; I don't know whether other people were seated or not.

Q. Now, when you went onto the boat did you form on the bank?

A. Yes sir.

Q. All you boys from Pullman formed on the bank?

A. Yes sir.

Q. And you marched down to the gang plank?

A. Yes sir.

Q. And isn't it a fact that you rushed the gates at the head of the gang plank and knocked over the gates?

A. No, sir.

Q. It is not a fact?

A. It is not.

Q. Were there gates knocked over?

A. No sir, not by the band boys.

Q. Who knocked them over?

A. I didn't know that they were knocked over.

Q. Did you see them fall?

A. No, sir.

Q. Now, it wasn't necessary to step from the gang plank to the roof or the covering of the wheel in order to get to the upper deck?

A. It would be the natural thing to do.

Q. That is not the question; was it possible?

A. It might have been possible, turn a right angle and go up.

Q. You saw the jury go up this morning and the other people?

A. No.

Q. You didn't see them?

A. No, sir.

Q. You say it could be done or could not be done?

A. It could be done, but not the natural thing to do.

Q. The natural thing to do was to step eight or ten feet to the covering of the wheel as you did, and then walk up?

A. I didn't step for eight or ten feet.

Q. The distance you showed the jury this morning was about eight or ten feet.

A. No, sir.

Q. It wasn't? How many feet was it?

A. It wasn't more than four feet from where I was standing.

Q. You say it wasn't more than four feet?

A. Four feet.

Q. From the foot of the ladder where you showed the jury this morning Hutchinson went through?

A. As I judge, yes.

Q. That would be a little over one step?

A. It would be a long step for me, for you too.

Q. That is right. How far is the end of the gang plank from the first step of the ladder, as near as you can say?

A. Oh, I should judge eighteen inches.

Q. Then you have to step eighteen inches from the gang plank onto that ladder?

A. Approximately.

Q. And you say that would be a difficult and inconvenient and unnatural thing to do?

A. Yes, surely I do.

Q. Was it not apparent that this rounding roof was not intended or suitable as a deck for passengers?

A. Perhaps wasn't built for that purpose, but was being used by the management of the boat.

Q. You band boys were the first ones to go on that covering?

A. I don't know.

Q. You heard Mr. Tuttle's testimony in which he said he was the first one to step out?

A. First band boy?

Q. Yes.

A. Yes sir.

Q. And you stepped out with him?

A. But there were people going up the ladder when we got there.

Q. Yes, going up the ladder?

A. There was a man standing on the wheel house when we got there.

Q. Wasn't it apparent to you that that wasn't intended as a place for passengers to walk, that rounded, where you might slip off anyhow?

A. It was being used for that purpose that day.

Q. Wasn't it apparent that it wasn't built for that purpose?

A. Perhaps wasn't built for that purpose.

Q. Anybody could look at it and see that that

rounding roof wasn't built for the purpose of having people walk on it. Isn't that right?

A. Yes sir.

Q. And you didn't see any officer or any employe of the company there telling people to walk over that roof, did you?

A. No, sir.

Q. Nobody told you to go out onto that covering?

A. No, sir.

Q. You went out on your own accord?

A. Yes sir.

Q. Mr. Hutchinson went out on his own accord?

A. Yes sir.

Q. And the leader of your band went out on his own accord?

A. Yes sir.

Q. Had you been on the boat before, this time.

A. No, sir.

Q. Had the band taken any other trips, on any excursions?

A. No, sir.

MR. SENN: That is all.

(Witness excused.)

WILLIAM A. MOSS: Called as a witness on behalf of the plaintiff being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Where do you reside, Mr. Moss?

A. At Payette, Idaho, is my residence.

Q. What are you doing at present?

A. I am a student at Washington State College, at Pullman, Washington.

Q. Were you a student at Washington State College, on May 3, 1915?

A. Yes sir, I was enrolled in the college at that time as a student.

Q. Were you in Lewiston, Idaho, May 3, 1915?

A. Yes sir.

Q. Did you go there with the state college band from Pullman, Washington?

A. Yes sir.

Q. Were you a member of the band at that time?

A. Yes sir.

Q. I wish you would state to the jury whether or not you were on the boat, J. N. Teal, May 3, 1915, and your manner of going on the boat; state what you had done and what you observed up to the time of R. Verne Hutchinson breaking through the covering of the water wheel?

A. The band boys had been on the bank, I was with the group of them, we formed a single line in order to pass on to the boat easiest, there was a crowd there waiting to get on the boat, and we formed in a single file so that was the only way we could stay together and get through and crowd and get onto the boat. And our leader, Mr. Tuttle, had the pass and was at the head of the line; he presented the pass and we were permitted to pass over the gang plank onto the boat. That was the bow of the boat, and as we passed onto the bow of the boat we passed onto

the stairs just at the left—it is on the right hand side of the boat toward the shore, as we passed to go up those stairs, the captain said, "Go to the upper deck, boys;" I presume he was the captain, he was the man standing on the front end of the boat. We passed on up the stairs onto the—what I would presume the passenger deck and passed back to the back end of the boat. At the back end of the boat I noticed there was a step ladder passing from the housing over wheel house, or over the wheel up to the upper deck, and there was six or eight of us fellows and we stepped over onto the housing from the gang plank, a little plank there, onto the housing, and there were a couple of ladies, as I remember it, one, I believe, was ascending the ladder and the other was with one of the band boys. Some of the fellows stepped aside in order to let these ladies go up first, and the rest of the boys followed suit and we stood there on the wheel house waiting until the ladder would be clear so that we could step up. There wasn't room for more than one or two people on the ladder at a time conveniently. We just simply stepped out on this housing to wait for these people to go up, and we hadn't been there more than about a minute when the thing just sunk and I jumped and grabbed the top of the roof, the roof, or it would be hurricane deck and swung myself in onto the boat.

Q. Now, I wish you would state whether or not there was any notice there not to go out on the covering of that water wheel?

A. No sir, I saw no notices whatever forbidding anyone going out onto the wheel housing.

Q. I wish you would state whether or not there was a guard stationed there ordering you not to go out on the covering of the water wheel?

A. No one said anything that I could hear about not going out on the wheel house and I didn't see anyone there for that purpose.

Q. Did you examine the break of the material where Mr. Hutchinson fell through after he had fallen through?

A. Yes sir.

Q. I wish you would state to the jury, what condition you found the timber in?

A. Well, the timber looked to me discolored and I would not judge it to be sound timber, it looked to me like it had been rotted out by the water. It was discolored nearly black, and the break seemed to be more or less square. That is, they were not splintered like an ordinary piece of sound timber would splinter, they were broken off square.

Q. I wish you would inform the jury whether or not you saw a band descend from that deck before you went aboard?

A. Yes sir, from the shore where we were standing we could see the boat as she came in to the shore and there was a band I remember them distinctly, they were in Indian costume, I believe they were Indians up on this hurricane deck, and I remember distinctly of seeing them descend down by this ladder

on the back end of the boat, descend down to the lower deck.

Q. I wish you would state to the jury whether there were chairs on the upper deck at the time you were attempting to go to the upper deck?

A. Yes sir, there were chairs there.

Q. How many chairs would you judge to be there?

A. At the time that I saw those chairs there, which was shortly after the accident occurred, I noticed that there were chairs there. I don't know just how many.

Q. I wish you would state to the jury, whether or not there was any scuffling or jumping or rowdyism among the boys or among the people that were on the covering of that water wheel.

A. To my knowledge there was none whatever.

Q. Do you know a man by the name of Bostock?

A. No sir, I don't remember the man; I don't believe I have ever met him.

Q. Now, were you on the boat today, Mr. Moss?

A. Yes sir.

Q. I wish you would state whether or not you went to the second deck on the side where the ladder runs to the upper or hurricane deck?

A. Yes sir.

Q. Now, did you understand me? I asked you the question whether or not you went on the boat on the side that the iron ladder is on?

A. Today?

Q. Well, no, not today, when you went aboard with the band?

A. No sir, we didn't; we went up on the side nearest the bank, there was no ladder on that side of the boat.

MR. LANGLEY: I think that is all, Mr. Moss.

CROSS EXAMINATION.

Questions by Mr. Senn:

Q. You saw no one around this ladder at the back or stern end of the boat, did you?

A. Why, there were a few—

Q. No employes, I mean, of the company.

A. Not that I noticed, no sir.

Q. No one told you to go out onto the covering of the wheel?

A. No sir, no one said to go out on the covering of the wheel.

Q. You went out of your own accord?

A. Yes sir, I went out, that was the only way to go up the ladder, was to go on it.

Q. Was it possible to step from that little plank board onto the ladder?

A. Yes sir.

Q. Go right on up.

A. Yes sir, I believe it would have been possible.

Q. You could have done that?

A. Yes sir.

Q. But instead of that you went out onto the roofing of this wheel?

A. Yes sir.

Q. Six or eight of you?

A. Yes sir, there was about that many there.

Q. And you remained there for about a minute or so?

A. Well, it was just about a minute.

Q. How many people passed up that ladder in the minute?

A. Well, there was, as I say, a couple of women going up and as I remember it, I don't know how many people went up that ladder during that time but I know that there were a few people in my way, that is, between me and the ladder, at the time I was standing on this housing, that is, I could not have walked right up the ladder easily, as there were a few people on the housing besides myself.

Q. No reason why you could not wait on the gang plank while the lady ahead of you got to the hurricane deck, was there?

A. No sir.

Q. You could have done that?

A. Yes sir.

Q. And the other boys could have done the same thing?

A. Yes sir.

Q. What did you boys do on the roofing there, chat together?

A. We were not there but just a minute, as I explained. We simply walked out on there, waiting for the other people to mount the ladder, presuming that it was absolutely safe and would bear our weight, having no fear at all but what it was meant for that purpose.

Q. Some six or eight of you did that?

A. Yes sir.

Q. Without any orders or instructions from anyone?

A. No, sir, no orders to go out on there at all.

Q. No—

A. But there was no way to get up the ladder without going out.

Q. You had no more orders to go out there than you did anywhere else?

A. The only orders we had to go any place on the boat was to go up on the upper deck.

Q. They didn't tell you what way to go or how to go?

A. No sir, we took the easiest means possible, the only way that appeared to go up there.

Q. Now, you say that some of the boys from Pullman had lady friends with them?

A. I believe there was one of the boys there that had a lady friend with him, yes sir.

Q. What kind of wood was it that covered this wheel?

A. You mean whether it was fir, pine or hemlock?

Q. Yes.

A. I am sure I could not say. It was in a rather discolored condition and I would not be able to judge as to what the nature was.

Q. You don't know whether it was fir or oak or hardwood or what it was?

A. I would not presume it was hardwood, I don't know.

Q. What were the sleepers made of, what kind of wood?

A. They appeared to be about the same, it was common lumber, some kind of lumber.

Q. When did you examine this place?

A. It was just after the accident had occurred. As I remember it, I came back from the boat in which I went to assist my friend who had gone overboard after Mr. Hutchinson's body.

Q. About how many hours was it?

A. Well, it wasn't more than an hour.

Q. Go back of your own accord to examine the place?

A. Yes sir.

Q. Go back alone?

A. I went back in company of the Assistant Chief of Police of Lewiston and one other gentleman who I presume was the—an officer on board the boat.

Q. Do you remember that officer's name?

A. No sir, I don't, but I remember his face. I remember seeing him down on the boat this morning; rather a tall gentleman and dark.

Q. You formed a single file on the bank?

A. Yes sir.

Q. How many of you students came over from Pullman?

A. Why, there was about—about thirty of us.

Q. Thirty of you?

A. In the band.

Q. And how many other students came?

A. I don't remember.

Q. How far is Pullman from Lewiston?

A. I don't know the exact distance. It is by railroad about sixty miles, I believe.

Q. You came over on the railroad?

A. Yes sir.

MR. SENN: That is all.

RE-DIRECT EXAMINATION.

Q. I will ask you just one question, Mr. Moss. I wish you would state to the jury whether or not it would be possible for you to turn at direct right angles when you had come out over the plank, to turn on to the steps leading up when there were other people going up the steps at the same time?

MR. SENN: If you Honor, please, we object to that as calling for a conclusion; the facts speak for themselves.

COURT: I think he need not answer the question; the jury understands the situation there.

(Witness excused.)

C. W. KING. Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Where do you reside, Mr. King?

A. Seattle.

Q. Where were you May 3, 1915?

A. Lewiston.

Q. What were you doing there?

A. I was private in the band.

Q. Were you on the boat, J. N. Teal, May 3, 1915?

A. Yes sir.

Q. I wish you would describe to the jury the manner in which you went on the boat and the occurrence connected with the falling of Mr. R. Verne Hutchinson through the water wheel.

A. To begin a little farther back than the other three witnesses have, and that is when we were passing the ticket office of the company just before ascending—or descending the back to the boat, just as the boat landed we were up there by the ticket office ready to go down to the boat at that time, I distinctly remember of an official of the boat company, evidently connected with the ticket office standing out there just above us on the platform, and one of the boys asking what part of the boat we should go to, and he told us to go to the hurricane deck and take the place of the other band, whom I then particularly noticed, to see which way they came down from the hurricane deck; having some experience with boats in the lake at Seattle, I knew the hurricane deck was not used except excursions and so on, when it was the time to use it—

MR. SENN: If your Honor please, we object to the conversation as irrelevant and incompetent and not binding.

COURT: Unless it was with an officer of the boat.

MR. SENN: He would have to show his qualifications, that the officer had the right to bind the company, before he can testify.

COURT: Of course he would have to show his authority.

A. I believe I am unable to do that.

Q. You may proceed with the story from where you stopped.

A. I noticed to see which way this band came down from that deck and also the few passengers that were up there; I noticed they came over the back end of the hurricane deck, and go down those stairs onto the wheel house and step over the rail and onto the promenade deck and go down to the main deck and off. Therefore, when we formed in back of our leader, Mr. Tuttle, Captain Tuttle, with the pass when we went on board we turned sharply to our left, went up the stairway, the natural one to go, went back down that side, no other way for them to go up except that one we had noticed from the shore, and stepped over—now, I will be rather explicit here because this seems to be a little doubt about this—Mr. Tuttle was first, then I came along in the next five or six, I was along about in there we came right out on this ready to go up the stairs, there was a lady going up the stairs and we stepped out. There was a lady very nearly behind me, I believe she was just preceding Mr. Dupertius, maybe the lady was behind, common courtesy would intend for us to step aside and let the ladies go up—

MR. SENN: Just a minute, we object, your Honor, to the testimony.

COURT: That is a part of the res gestae. That is after you got outside on the wheel house?

A. Yes sir.

COURT: Very well, that is part of the res gestae.

A. That is permissible, is it?

COURT: Very well.

A. That was the natural thing for us to do, and that accounts for us being six or eight of us on the wheel house there waiting for the ladies to go up ahead of us, in which case we were waiting to proceed right on. Then the crash came.

Q. Now, what occurred following that, where were you standing when Mr. Hutchinson broke through?

A. I was standing beside him on the other side of Mr. Dupertius. Well, it was a rather lucky circumstance that I was able to get hold of the rail, I don't remember exactly how I did, it happened so quickly, but I eventually gained the rail and went over onto the deck with some idea of going forward and seeing—trying to catch sight of him if he came up on the under side; the sweep of the current would naturally carry him to the outer side of the boat, that side, I went through to that side and heard the cry "Man overboard" and looked back down the rail just in time to see him just disappearing under the water about fifteen feet upstream from me. I then went forward, expecting any second to hear three or four go in the water, expecting that, but went forward and took off my military coat that I had on, and shoes and went off the front end of the boat and I remember being surprised that there was nobody went in and I found out—

COURT: I think that is a matter of detail, not necessary to relate that.

A. That is what follows.

Q. I wish you would state, Mr. King, if you will, whether or not there was any rowdy condition among the boys there.

A. There was absolutely none, it was a military band.

Q. Were there any notices there that told you not to go out there?

A. I saw none.

Q. Were there any guards there telling you not to go out there?

A. I saw none.

Q. Did you examine the timber where the break was?

A. I didn't examine the timber where the break was, but I picked up timber that had fallen through the wheel, down the river about six hundred yards, that had gone on an island there.

Q. I wish you would state what the condition of that timber was?

A. On the under side, the timber that would be on the underside next in contact with the water, was blackened and in a decayed condition, and the timber where you got a cross section view of it was discolored, showing various degrees of deterioration, rather marked on the under side, and, as has been said before, the break was direct, not a splintered break like sound wood would break, but as a piece

of charred wood or bark would break, the break of decayed wood.

MR. LANGLEY: I think that is all, Mr. King.

CROSS EXAMINATION.

Questions by Mr. Senn:

Q. How old are you?

A. Twenty-one.

Q. You are going to Pullman College?

A. Yes sir.

Q. Pullman, Washington. You were one of the band boys?

A. Yes sir.

Q. What time did you go to Lewiston from Pullman?

A. On the morning train.

Q. What time did you leave Pullman?

A. I think that train came through Pullman seven o'clock, I would not be certain as to the train.

Q. That was an excursion train?

A. That was an excursion train, ran from Pullman, to Lewiston.

Q. How many students got on at Pullman?

A. The entire band of about thirty-five pieces, and a few other students, I don't remember how many.

Q. Mr. Bostock, did you know him?

A. I only know him just to speak to him that is all; I don't know him.

Q. He was a student there at the same time?

A. I don't know.

Q. You knew when you said you knew him to speak to?

A. He evidently resided in Pullman at that time; I don't know whether he was enrolled or not.

Q. Now, you spoke to him in Pullman?

A. Yes sir.

Q. You certainly know whether he was a student there?

A. No, not necessarily, there are several boys that are in Pullman are not students of the college.

Q. And you had talked to him several times?

A. I don't think so, I never talked to him.

Q. How many times had you spoken to him?

A. I may have spoken to him half a dozen times in the course of the semester previous or meeting him around in the campus.

Q. Meeting him around in the campus half a dozen times?

A. Possibly.

Q. Spoke to him that many times, possibly?

A. I should judge so, along with a thousand other students.

Q. You are not certain whether he was a student there or not?

A. No sir.

Q. What time of day was this accident?

A. Between half past three and twenty-five minutes. Why I happened to notice the time special—

Q. You looked?

A. I looked at the shore to settle a bet as to whether the boat would be on time or not.

Q. After the accident you went down the river six or seven hundred feet?

A. About five or six hundred yards?

Q. Five or six hundred yards?

A. Yes sir.

Q. That is about a third of a mile?

A. Yes sir.

Q. Saw a piece of lumber there?

A. That had drifted down, yes, sir.

Q. Of course you recognized it as a piece coming from the wheel?

A. The lumber had drifted with me all the way down the river. I naturally knew it came with me.

Q. You walked down and saw the lumber drift down the river at the same time?

A. No sir, I was in the river.

Q. How did you go down?

A. No sir, the current carried me down.

Q. You were in a boat?

A. No sir, I went off the front end in hopes of rescuing Mr. Hutchinson, if he would come up.

Q. Now, how many of you boys lined up on the bank?

A. Preparing to go on the boat before the accident?

Q. Yes.

A. All but four or five members of the band, that was about thirty, I should say.

Q. And where was it that you had this talk

with—that you say he was an officer of the company, about going on the hurricane deck?

A. That was about one hundred yards up from the boat, up near the ticket office there.

Q. In the city office?

A. No sir, dock office, evidently.

Q. One hundred yards.

A. One hundred yards up from the prow of the boat, where it was on the bank.

Q. And an officer told you there that he wanted you on the hurricane deck?

A. He didn't tell me personally, someone of the members of the band asked him what part of the boat we were expected to go on and he was standing up there in his shirt sleeves on a hot day right by the ticket window, that is the only reason I knew he was an officer of the company, told us to take the place of the other band on the hurricane deck.

Q. Did you ever see the man before?

A. No sir.

Q. Could you see the boat from that place?

A. Yes sir.

Q. Did you get your pass at that place?

A. I don't know where the pass was obtained. I had nothing to do with that. I was simply a private in the band, the captain had that to attend to.

Q. You don't know where he secured the pass to go on the boat?

A. I found out later.

Q. Now, as I understand, after you got on the boat you went to the back end of the boat?

A. Yes sir.

Q. All of you happened to pass on the same side of the boat going back?

A. Natural for a military organization to stay together when they are directed to go to one place.

Q. You all went on the left side of the boat going back?

A. No sir, the starboard side, right hand side, it was our left hand side because we were headed toward the stern.

Q. You got on the bow of the boat?

A. Yes sir.

Q. And you walked back on the right hand side?

A. Starboard side of the boat, yes sir.

Q. You got on the bow of the boat and walked on the right hand side?

A. On your left hand side, because we were facing the stern.

Q. Then it was the left hand side of the boat going toward the stern?

A. Yes sir.

Q. How many of you went back there together?

A. All of us of the band.

Q. You all went in a bunch?

A. We went in single file. I believe that some of the rear half of the band may have been split up somewhat by the crush of passengers on the boat. It was rather impossible and it would have been rather rough to have held together when we had to pass through the crowd like that, of course we naturally would separate a little bit.

Q. Of course, military tactics, you would all have have to go together, that would be the rule, wouldn't it, with a military band?

A. That would be, as nearly as possible in accordance with politeness.

Q. You would not be able to split up and still follow out the military rule, would you?

A. I believe so.

Q. You would all have to follow each other and in file, all according to military rule?

A. Not necessarily, no sir.

Q. Now that Pullman there is not a military school, is it?

A. The military side of the school is.

Q. What is that?

A. The military end of the school; the school is not a military school, but we have enforced drill there by the United States government; we are members of the National Guard.

Q. A state school, are you not?

A. Yes sir.

Q. State agriculture?

A. The agricultural school is one of the colleges in the college.

Q. What is it?

A. The agricultural school is one of the colleges in the college, among others.

Q. It is known as the Washington State Agricultural School, is it not?

A. No sir, until 1903 it was known as the Wash-

ington Agricultural College; now it is the Washington State College.

Q. It is commonly known as the agricultural college in the State of Washington?

A. It is the only agricultural college in the State of Washington, yes sir.

Q. Now, you went back to the back end, how many of you would you say?

A. Oh, about thirty.

Q. Each of you went to the back end, all in single file?

A. Yes sir.

Q. Did any of you climb over the railing or did you all go over this plank walk?

A. I could not say as to that. I should judge that we didn't all go over the plank as it looked it wasn't necessary. The plank was there for the convenience, possible of ladies, to whom that step would have been —a step of two feet there would have been a little bit more than convenience would permit.

Q. You climbed over the railing onto the covering of the wheel?

A. Had to climb over the railing to get on the plank.

Q. Didn't some of you climb over the railing and get on the covering of the wheel?

A. I could not say as to that.

Q. You would not say that you didn't, would you?

A. I would say that I didn't, because I went over the plank.

Q. Now, isn't it a fact that you boys were anxious

to get out on the covering of the wheel, on the hurricane deck, that you went out over the rail, didn't wait for any plank, to walk on, you went over the rail?

A. I don't know as to what the rest of them did, but I didn't myself, because it happened to be natural for me where I was standing to go over the plank.

Q. Who went first among the boys?

A. Captain Tuttle.

Q. And he took his position out on the covering of the wheel?

A. Yes sir, knowing that there was a lady behind us, we stepped aside to wait for her to get up.

Q. He took the lead, didn't he, of these thirty boys?

A. Yes sir.

Q. You were all in line?

A. Yes sir.

Q. How far back was this lady?

A. She came on to the plank after possibly five or six boys had gone on.

Q. Crowded in between the files of you boys?

A. I should judge she did.

Q. You should judge she did?

A. Yes sir, I would judge she would not have to crowd through.

Q. Now, Captain Tuttle, as you say, was in the lead, and then came about five or six of you boys, and then came this lady?

A. Yes sir.

Q. And Captain Tuttle saw this lady back here about five or six, and seeing her he walked out on

the covering of the wheel and all the rest of you followed suit so that she could go up the stairs.

A. I don't know what Captain Tuttle's reason was.

Q. What is it?

A. I don't know what his precise reasoning was for doing that, but I should judge he knew there was ladies—people—at least there was a lady on the ladder going up and it was impossible for him to go on the ladder while she was there.

Q. Couldn't he follow her, she was going right up the ladder?

A. He would have had to wait.

Q. And you didn't want to wait; is that it?

A. I don't know whether that would be it or not.

Q. You had to wait out on the covering of the wheel, didn't you? Isn't that right?

A. Well, I don't know where else we could have waited.

Q. How long did you stay on the covering of the wheel before the accident?

A. Less than a minute.

MR. SENN: That is all.

(Witness excused.)

MR. LANGLEY: I think that it may be necessary for us to show the expectancy of the life of the boy who has lost his life. They have denied that. Would you be agreeable to stipulate that?

MR. SENN: Whatever it is then. You say it is—

MR. LANGLEY: Thirty-nine years.

COURT: Have you the tables here?

MR. LANGLEY: Yes.

COURT: Very well, the court will take your word for it.

MR. SENN: If you say that is it.

MR. LANGLEY: It is stipulated that the expectancy of R. Verne Hutchinson is thirty-nine years. Then, as I understand, it will not be necessary for us to introduce the statutes of the State of Idaho; the court will take judicial notice of the state statutes?

COURT: Ordinarily he will. If you have the statute here you might introduce it.

MR. LANGLEY: I haven't the statute here, I have it as it appears in Tiffany on Wrongful Acts, and it is the same now.

COURT: I suppose that is authoritative. If it is, it may be introduced.

MR. SENN: If you will let me see it. I think I remember the statute. Yes, that is it.

COURT: Very well.

MR. LANGLEY: I haven't the statute, if Your Honor pleases, of descent here in this, but the mother is the legal heir under the statute of distribution in the State of Idaho. I suppose the court will take judicial knowledge of that.

COURT: She is the only heir?

MR. LANGLEY: She is the only heir under the statute in the State of Idaho.

COURT: Is that admitted?

MR. SENN: I am not sure of that, Your Honor. I remember reading an Idaho case—

COURT: That is a question of law and you can look into that.

MR. SENN: Possibly we can look into that by morning.

COURT: Yes, very well.

MR. LANGLEY: Now, there is only one other matter I would like to, if Your Honor will permit me to—to read this section into the record.

COURT: Very well.

MR. LANGLEY: (reading) "Section 4100: When the death of a person not being a minor is caused by the wrongful act of neglect of another, his heirs or personal representatives may maintain an action for damage against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all of the circumstances of the case may be just." There is only one other bit of evidence that I would like to introduce, and I want to ask Your Honor whether Your Honor considers that admissible or not. As we will indicate to the court from a decision of the State of Idaho, the measure of damages is the loss of the comforts of the society and the companionship and the intelligence of the deceased person is an element of the measure of damages. Now, I think it would be competent to go before this jury to have the picture of the deceased boy before them, that they may read from the picture as much of the index of the character f rom the picture as the picture

will give them. And I wanted to call the sister of the deceased boy to identify the picture. I ask the court as to what the court's view is because I did that once and it was ruled out, under the measure of damages of this state, and I was afterwards accused of having called one of the relatives for the purpose of using it as sympathy and I don't want that in this case, and I would like to have Your Honor's view on that before I attempt it.

COURT: Do you object to it?

MR. SENN: The only claim we make, Your Honor , our contention is that for the pecuniary loss, which is the measure of damages in this case and the only thing to be considered would be, if it came to that point, the pecuniary loss which the plaintiff has suffered by reason of this death. The question of loss of society and matters of that kind have no— would not be admissable, consequently we think that this testimony would be inadmissible.

COURT: I don't know what the rule is in Idaho as to the measure of damages in a case like this. The sole heir is suing, and she is at the same time the mother. While it has been running in my mind as to whether the measure of damages would be the loss of society, or whether it would be the loss that would accrue to the estate of the deceased.

(Argument.)

COURT: Have you any further remarks?

MR. SENN: Nothing, Your Honor.

COURT: Do you still object to the picture being offered?

MR. SENN: Yes.

COURT: I think I will sustain the objection, because the intelligence can be told by word of mouth as well as it could be shown by the picture, and I think the oral evidence is better than the picture.

MR. LANGLEY: I have just the deposition, then, of the mother. This is the deposition of Ella A. Hutchinson, the plaintiff in the case. (Reading): * * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchinson for yourself, and upon your part for your son, R. Verne Hutchinson?

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure for damages—not an element.

COURT: I will overrule that objection, I think that is proper.

MR. SENN: Save an exception.

COURT: Very well, you will be allowed an exception.

MR. LANGLEY: (Finishes reading deposition) That is our case, Your Honor.

PLAINTIFF RESTS.

Adjourned to April 22, 1916, at 10 o'clock A. M.

Portland, Oregon, April 21, 1916, 2 P. M.

MR. LANGLEY: I wish to introduce the deposition of Mrs. Tifft. (Reads deposition of Laura E. Tifft, as follows:)

"Q. State you name, age and place of residence.

A. Laura E. Tifft, age 42 years, Colfax, Washington.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. If your answer be in the affirmative, state where you went aboard.

A. Lewiston, Idaho.

Q. Had you paid for transportation?

A. Yes.

Q. At the time Mr. Hutchison broke through the covering of the water-wheel of boat 'J. N. Teal' did you hear a cry of 'Man overboard?'

A. I did.

Q. If your last answer be in the affirmative, state where you were at the time?

A. I was about the middle of one side of the boat, on cabin or main passenger deck.

Q. State, if you know, what means, if any, were provided on the boat to reach the upper or hurricane deck from the stern or water-wheel of the boat.

A. A board from the railing to the wheel-house covering and from there steps led to the hurricane deck.

Q. Where had you been on the boat, from coming aboard to the time when you heard the cry of 'Man overboard?'

A. I followed the band to the stern of the boat, and then started with Dr. Tifft towards the bow of the boat.

Q. About how long after your coming aboard

was it, before you heard the cry of 'Man overboard?'

A. About five or six minutes.

Q. Did this occur before the trip of the boat was started?

A. Yes.

Q. Did you see any persons on the water-wheel covering?

A. Yes, I did.

Q. I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to.

A. That is the way it looked to me.''

MR. LANGLEY: I have the picture here and I would like to introduce it in evidence.

Picture marked Plaintiff's Exhibit 1.

MR. LANGLEY: Gentlemen, you can pass that along.

MR. SENN: Just a minute, I understand the offer is merely for identification.

MR. LANGLEY: I will offer it in evidence.

MR. SENN: Is there anything, Mr. Langley, as to when this picture was taken? Do you know when it was taken?

MR. LANGLEY: I could tell when it was taken, but I don't understand that that would be necessary for the purpose of introducing it in evidence, so long as it shows the condition that existed at that time.

COURT: Who took the picture?

MR. LANGLEY: The picture was taken by a young gentleman in Endicott, I think a day or two following this occurrence. The question that I have asked the lady is this: "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat J. N. Teal in every detail and particular as the same existed." She has previously testified that she was there at the stern of the boat at the time of the cry of "Man overboard."

COURT: You say this picture was taken a day or two after?

MR. LANGLEY: It was taken a day or two after, but I am saying that that picture shows the condition that existed at that particular time. I could not bring the photographer here.

COURT: Let me see the picture.

MR. SENN: I don't believe we will object to it, Your Honor.

COURT: Very well, let it go in. Let me see it. (Inspects picture.)

MR. LANGLEY: Gentlemen, you can just pass that along and look at it. (Continues reading.) "Mark on the picture with the letter 'L' the farthest point you may have reached toward the upper or hurricane deck.

A. .....

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the

covering of the water-wheel, or not to go to the upper hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat or any notices of any kind, character or nature whatsoever which had to do with the use of the stairs leading from the covering of the water-wheel to the upper or hurricane deck.

A. I didn't see any.

Q. State whether or not you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of water wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not.

MR. SENN: That was objected to, Your Honor, and I think the objection might be well taken on this ground, as I understand this lady did not go to the hurricane deck, did not attempt to go to the hurricane deck, she was simply one of the passengers of three hundred or three hundred fifty, and I think the fact that she didn't try to go there, made no effort to go there, that she was not told not to go there would not be any evidence in this case.

COURT: She was one of the passengers on the deck?

MR. SENN: Yes.

COURT: She was on the passenger deck?

MR. SENN: She was on the passenger deck, but

as I understand made no effort to go to the hurricane deck.

COURT: I understand, but she was there. I think I will admit the testimony.

MR. LANGLEY: That completes the deposition of Mrs. Tifft. I introduce in evidence the deposition of G. V. Barker. (Reads deposition of G. V. Barker, as follows):

Q. State your name, age, residence and occupation.

A. G. V. Barker, 42 years, Orofino, Clearwater County, Idaho, photographer.

Q. I hand you a picture marked for identification 'H. L. W. No. 1' and ask you if you are the photographer who took the same.

A. Yes.

Q. If your answer be that you are, state what date the time of day and where the same was taken.

A. May 2nd, 1915, about 2:30 P. M. Taken at Captain John's landing on Snake River, above Lewiston, Idaho.

Q. Is the boat shown in the picture, the steamer known as the 'J. N. Teal?'

A. Yes.

Q. Is the picture a true likeness of the physical conditions existing at the time of the taking of the same?

A. Yes.

Q. I hand you a picture marked for identification 'H. L. W. No. 2.' First, however, I wish to offer the first picture, No. 1, in evidence.

COURT: Very well.

MR. SENN: We will object to that picture, Your Honor, as I understand in the deposition it wasn't offered in evidence, merely marked for identification. I think at the time of the taking of the deposition they should have offered it in evidence and without introduced at that time they cannot introduce it now. Second, that this appears to be a picture taken the day before the accident, when the conditions might not have been the same, or are different, and I think for that reason it would not be admissible.

COURT: I presume it is to show the matter of the boat; that is, the construction and form of the boat; is that what it is introduced for?

MR. SENN: It does not show that at all.

MR. LANGLEY: It is not for that purpose.

COURT: I will sustain the objection.

MR. LANGLEY: That is all.

MR. SENN: We raise the same objection to this picture. The same thing.

MR. LANGLEY: That is all of that deposition. The deposition of Dell Wilson. (Reads deposition of Dell Wilson, as follows:) "State your name, age, and place of residence.

A. Dell Wilson, aged 38 years, 111 State Street, Pullman, Whitman County, Washington.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. Yes.

Q. If your answer be that you were, state whether or not any one accompanied you.

A. Yes, I had my wife and little girl, and I sat there and talked with a couple of fellows before we went up on the top.

Q. If your answer be that there were persons accompanied you in going aboard, state who the persons were.

A. Besides my wife and little girl, I talked with Will Struppler and Ray Walker and Mr. E. W. Downen on top.

Q. What was your purpose and that of your wife and daughter in being aboard said steamer?

A. We went on board for the excursion trip.

Q. Were you or your wife or daughter employed by the boat owners or in the service of said boat?

A. No.

Q. If you state you and those accompanying you were aboard at the time above mentioned, and not in the service of the boat and were taking a river ride, state at what place you boarded the boat, and to what place you traveled.

A. We got on just above the bridge there on the Lewiston side. We went up to Asotin, Washington, and back.

Q. Did you pay a fare for transportation?

A. We paid a fare.

Q. About what time of day was the trip started and completed?

A. We started around one o'clock or after one o'clock and we were about an hour making the trip.

Q. State if you know whether or not the trip you made on Steamer 'J. N. Teal' was a previous

trip of the boat than the trip about to be started when a Mr. Hutchinson fell through the water wheel covering of said boat.

A. It was.

Q. State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

MR. SENN: Just a minute, Your Honor, we will object to that as irrevelant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: Yes.

COURT: On that particular day. Special notice ought to be applied to the day of the accident.

MR. LANGLEY: If Your Honor understands me, I don't mean by that that I am attempting to

say that there was posted notice, by the deposition; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do than, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (Continues reading deposition): "State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on the trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to; state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water-house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck state whether or not you saw other persons

than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify that you saw other persons than those engaged in the service of the boat using the stairs, state about how many?

A. I would say a dozen or fifteen before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip?

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck?

A. In the neighborhood of thirty or forty."

MR. SENN: Just a minute, Your Honor, those are all objected to; I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

MR. LANGLEY (continues reading): "State whether or not there were notices posted—"

COURT: Before you read the answer—

MR. LANGLEY: "—near the water-wheel of

said boat or on said boat at all, giving warning not to go out on the covering of the water-wheel, or not to go to the hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to, or referred to the use of the stairs from the covering of the water-wheel to the upper or hurricane deck."

COURT: I think you ought to confine that question to the day of the accident, or questions of that nature.

MR. LANGLEY: Does Your Honor understand that this was the same day?

COURT: I thought it was the day before.

MR. LANGLEY: No, this man was taking a ride the morning of the same day.

COURT: How long before the accident?

MR. LANGLEY: Well, I think that he could not have been more than an hour—I think the deposition will show.

COURT: I will hear the testimony then; I will overrule the objection.

MR. SENN: Not the same trip, Your Honor, a different trip.

COURT: Yes, I understand, it is so near the time I will permit that to go to the jury.

MR. LANGLEY (resumes reading):

"A. There was none that I saw near the water-wheel.

Q. If you have testified that you and those ac-

companying you were on the covering of the water-wheel of said boat for the purpose of ascending from the lower to the upper or hurricane deck, state whether or not you or those accompanying you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck, or given any verbal warning of any kind, character or nature.

A. No, there was nobody gave us any warning or said a word to us about not going up.

Q. Did any member of the boat's crew aid passengers to ascend to the hurricane deck by way of the stairs leading from the wheel-house?

A. Yes.

MR. LANGLEY: I read the deposition of John Bostock. (Reads deposition as follows):

Q. State your name, age, place of residence, and occupation.

A. John Bostock, age 24, Roslyn, Wash.

Q. Were you aboard the steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. Yes.

Q. If your last answer be in the affirmative, state whether or not this was on a previous trip of the boat, than the trip about to be started when a Mr. Hutchison fell through the water-wheel covering of said boat?

A. Yes.

Q. If your answer is that it was a previous trip,

state where from, and to what place, the trip was made.

A. Lewiston to Asotin.

Q. State if this trip was made May 3, 1915

A. Yes.

Q. State whether or not on this trip you were on the upper deck of the boat.

A. Yes, on the upper deck."

MR. SENN: I think, Your Honor, counsel ought to read the objections that are made as we go along, so that the record will show.

MR. LANGLEY: There are no objections here noted in this deposition at all; there was no objection.

MR. SENN: There were objections in all the other depositions that were not read by counsel.

COURT: There is no need to take up time of the Court in reading the objections unless you insist on the objections, and if you insist on the objections the Court will hear you.

MR. SENN: Yes.

MR. LANGLEY (continues reading): "If your answer is that you were on the upper deck of the boat on a previous trip on May 3, 1915, state by what stairs, if any, you ascended to the upper deck."

MR. SENN: Now, at this time I will object on the ground it is irrelevant, immaterial and incompetent.

COURT: The objection will be overruled. You may proceed.

MR. LANGLEY (continues reading):

"A. Over the wheel by stairs leading to upper deck.

Q. If you testify that you had ascended by stairs leading from the covering of the water-wheel to upper deck, state whether or not you saw other passengers using the same stairs, as a means of ascent to the upper deck.

A. There was more besides myself.

Q. If you testify you saw other passengers using the stairs, state about how many.

A. There was three that I know of.

Q. If you have testified that you were on the upper deck, May 3, 1915, state about how many persons were on the upper deck at the time.

A. The band was up there, and twenty others or more.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel, or not to go on the upper deck, or not to use the stairs leading from the covering of the water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. There was not any.

Q. If you have testified that you were on the covering of the water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go

to the upper deck of said boat, or not to use the stairs, leading from the covering of the water-wheel to the upper deck, or given any verbal warning of any kind, character or nature.

A. I was on the—" There is just one word that I don't make out—it is not legible, I can't make out just one word, but it says "—and jumping on it, and there was no one warned us to keep off.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any character, kind, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. No."

MR. LANGLEY: The deposition of Gottfried Herbst. (Reads deposition as follows):

Q. State what, if any, position you held with the Washington State College Band, May 3, 1915?

A. I was leader of the band at that time.

Q. At what place were you with the band, May 3, 1915?

A. I was at Lewiston, Idaho.

Q. Was R. Verne Hutchison a member of the Washington State College Band, May 3, 1915?

A. Yes.

Q. Was Mr. Hutchison with the band at Lewiston, Idaho, May 3, 1915?

A. Yes.

Q. State whether or not the Washington State College Band, as an organization, was to be given a ride on the steamer 'J. N. Teal' May 3, 1915?

A. Yes, the College Band was invited to take a trip on the steamer—any steamer.

Q. Did Mr. Hutchison go aboard the steamer 'J. N. Teal' May 3, 1915, at Lewiston, Idaho, as a member of the band?

A. Yes.

Q. Was Mr. Hutchison in the employ or service of the boat at the time of the accident?

A. No, he was a guest.

Q. Was the band to play?

A. No, we were there without instruments.

Q. Did the members of the band have their instruments.

A. No.

Q. Were you aboard the steamer 'J. N. Teal' at Lewiston, Idaho, May 3, 1915?

A. No, not until about an hour after the accident to Mr. Hutchison.

A. If your answer be that you were, state whether or not this was before or after the accident to Mr. Hutchison.

A. After.

Q. State whether or not you were at the deck railing at the stern of the boat, on the deck immediately below the hurricane deck, and near the stairs leading from the water-wheel.

A. Yes.

Q. If you state you were, state how long it had

been after the drowning of Mr. Hutchison that you were at this place on said boat.

A. Perhaps about an hour.

Q. Did you look about this part of the boat for notices to passengers?

A. Yes.

Q. State whether there were notices posted near the water wheel of said boat, or on said boat at all, giving a warning not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck, or not to use the stairs leading from the covering of water-wheel to upper or hurricane deck of said boat, or any notices of any kind, character or nature whatsoever, which had to do with the use of the stairs leading from the covering of the water wheel to the upper or hurricane deck.

A. I saw nothing.

MR. LANGLEY: If you will refer back to the deposition of Mr. Bostock, the answer that I could not make out has since been deciphered and it says "I was on the covering and jumping on it, and there was no one warned us to keep off." The deposition of Miss Lowrey. (Reads deposition as follows):

Q. State your name, age, place of residence and occupation.

A. Mertico Lowrey, 21 years, Sandpond, Idaho, teacher.

Q. Were you aboard the steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. Did you pay a fare for transportation on said boat?

A. I did.

Q. If your answer be that you were aboard the steamer 'J. N. Teal' May 3, 1915, state where you went aboard?

A. At Lewiston, Idaho.

Q. Do you recall Mr. R. Verne Hutchison breaking through the covering of the water-wheel of said boat, May 3, 1915?

A. I saw him break through.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. I was on the upper deck near the stairs leading from the water-wheel to the upper deck.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By the stairs which were located on the covering of water-wheel leading to the upper deck.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs, at the time you were informed there was a man overboard?

A. About three minutes.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. Yes.

Q. If so, about how many?

A. About eight or ten.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water wheel, or not to go to the upper deck or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper or hurricane deck.

A. There was no notice near the water-wheel at all forbidding the use of the stairs to go on the upper deck. The only notice I saw was on the other end of the boat near the cabin which read: Passengers not allowed on upper deck.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of water-wheel, or not to go to the upper deck of said boat or not to use the stairs leading from the covering of water-wheel to the upper or hurricane deck, or given any verbal warning of any kind, character, or nature.

A. No verbal warning of any kind was given to me.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper or hurricane deck, or not to go upon the covering of said water-wheel, or any warning of any kind, char-

acter, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I never heard of any warning being given to anybody."

MR. LANGLEY: The deposition of Hazel Armstrong. (Reads deposition as follows):

"Q. State your name, age, place of residence and occupation.

A. Hazel Armstrong, age 21, Genesee, Idaho, public school teacher.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. Yes.

Q. If your last answer be in the affirmative, state where you went aboard.

A. Lewiston.

Q. Do you recall Mr. R. Verne Hutchison, breaking through the covering of the water-wheel of said boat May 3, 1915?

A. Yes.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. Upper deck.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By means of a small stairway or steps.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs,

at the time you were informed there was a man overboard?

A. I had just reached the upper deck—probably a minute had elapsed.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. Yes.

Q. If so, about how many?

A. Three or four.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I saw no notices of the boat that warned the people not to go to the deck or use the stairs.

Q. If you have testified that you were on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not warned not to use the stairs leading

to the upper deck, nor I didn't receive warning of any kind.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel, to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I heard no warning given to anyone not to use the stairs leading from the wheel covering to the upper deck. I saw nor heard any warning given to any kind concerning the use of these stairs or the going upon the water-wheel."

MR. LANGLEY: The deposition of L. R. Stebbins. (Reads deposition as follows):

Q. State your name, age, place of residence, and occupation.

A. L. R. Stebbins, age 24 years; residence, Lewiston, Idaho; occupation, contractor.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. I was, and paid my fare to get aboard.

Q. If your last answer be in the affirmative, state where you went aboard.

A. At the Lewiston Boat Landing for passengers.

Q. Do you recall Mr. R. Verne Hutchison break-

ing through the covering of the water-wheel of said boat, May 3, 1915?

A. Yes, I recall the incident.

Q. If your last answer be in the affirmative, state what place you were at on the boat, at the time.

A. I was on the upper deck of said boat.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck?

A. By the way of the wheel-house, and the stairs leading from the wheel-house to the upper deck.

Q. If you state you had ascended by stairs leading from the covering of the water-wheel to the upper deck, how long had it been since you used the stairs at the time you were informed there was a man overboard?

A. Within the range of thirty minutes.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. There was.

Q. If so, about how many?

A. About one dozen.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notice of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water wheel to the upper deck.

A. I saw none.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. The only warning I had was that there were no chairs for anyone except the band boys on the upper deck.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature.

A. I did not.

Q. Was the time of the facts to which you have testified the time when R. Verne Hutchison lost his life by drowning?

A. Yes.

Q. Were you on the upper deck at the time of the accident?

A. I was.

Q. What part of the boat do you mean by the upper deck?

A. The deck reached by the stairs leading upwards from the top of the wheel-house."

MR. LANGLEY: The deposition of Mrs. C. E. Stebbins. (Reads deposition as follows):

"Q. State your name, age, and place of residence.

A. Mrs. C. E. Stebbins, age 61 years; residence, Lewiston, Idaho.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. I was, and my son, L. R. Stebbins, paid my fare.

Q. If your last answer be in the affirmative, state where you went aboard.

A. At the Lewiston Boat Landing for passengers.

Q. Do you recall Mr. R. Verne Hutchison breaking through the covering of the water-wheel of said boat, May 3, 1915?

A. I do.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. I was on the upper deck, or top.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By way of the stairs.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs, at the time you were informed there was a man overboard?

A. Just a short time.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. There was.

Q. If so, about how many?

A. I could not say; maybe a dozen.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I did not see any.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. I was not.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature,

which had to do with the going upon the water-wheel covering of said boat.

A. I did not.

Q. Was the time of the facts to which you have testified, the time when R. Verne Hutchison lost his life by drowning?

A. It was.

Q. Were you on the upper deck at the time of the accident?

A. I was.

Q. Do you mean by the upper deck the hurricane deck of the boat?

A. Yes.

Q. At which end of the boat were the stairs by which you ascended to this upper deck?

A. At the wheel-house.

Q. Did these stairs lead from the wheel-house?

A. They did."

MR. LANGLEY: The deposition of Dr. J. Floyd Tifft. (Reads deposition as follows):

"Q. State your name, age, place of residence, and profession.

A. Dr. J. Floyd Tifft, 37 years of age, Colfax, Washington, dentist.

Q. Have you been Mayor of Colfax, Washington?

A. Yes.

Q. Are you now President of the Commercial Club of Colfax, Washington?

A. I am not.

Q. Have you been President of the Commercial Club of Colfax, Washington?

A. I was last year.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. If your answer be in the affirmative, state where you went aboard.

A. At the dock at Lewiston, Idaho.

Q. Had you paid for transportation?

A. I had.

Q. At the time that Mr. Hutchison broke through the covering of the water-wheel of the boat 'J. N. Teal' did you hear a cry of 'Man overboard?'

A. I did.

Q. If your last answer be in the affirmative, state where you were at the time?

A. On the side of the boat, walking towards the bow.

Q. State, if you know, what means, if any, were provided on the boat to reach the upper or hurricane deck from the stern or water-wheel of the boat.

A. A plank from the railing to the water-wheel covering and from there a ladder running up to the deck.

Q. Where had you been on the boat from coming aboard to the time when you heard the cry of 'Man overboard?'

A. Came on the boat, went first to the bow of the cabin or the main passenger deck, secured some seats or chairs and then went to look for my wife

and found her at the stern of the same deck trying to get up to the hurricane deck by the above described steps or ladder, then started for the seats at the bow.

Q. About how long after your coming aboard before you heard the cry of 'Man overboard?'

A. Probably from three to five, six or seven minutes.

Q. Did this occur before the trip of the boat was started?

A. Yes.

Q. If you have stated you were on the water-wheel covering after coming aboard, state what you were doing there, and whether or not Mrs. Tifft was with you?

A. I was not on the water-wheel covering.

Q. Did you see others on the water-wheel covering?

A. Yes.

Q. I hand you a picture marked for identification 'S. R. S.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to.

A. Yes, with the exception of the steps, which appear heavier.''

MR. LANGLEY: I think that I will ask to offer that picture in evidence at this time. It is exactly the same picture as Mrs. Tifft identified.

MR. SENN: No objection.

Picture marked Plaintiff's Exhibit 2.

MR. LANGLEY (continuing reading deposition of Dr. J. Floyd Tifft):

"Q. If your answer is not in the affirmative, explain any difference there may be, as between the conditions existing at the time of the accident, and as shown by the picture.

A. The steps appear heavier, perhaps due to what appears to be by this picture a cloth covering underneath.

Q. If you make any distinction, state whether or not the photograph is a complete likeness in every other particular.

A. Yes.

Q. Mark on the picture with the letter 'T' the farthest point you may have reached toward the upper or hurricane deck.

A. .....

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel or not to go to the upper or hurricane deck, or not to use the stairs leading from the covering of water-wheel to upper or hurricane deck, of said boat, or any notices of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I did not see any.

Q. State whether or not you looked for notices after Mr. Hutchison had broke through the covering of the water-wheel.

A. I did.

Q. If your answer be in the affirmative, state whether or not you found notices.

A. I did not.

Q. State whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. I was not.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper or hurricane deck of said boat, or not to go to the upper or hurricane deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I did not.

Q. State whether or not you saw the place where Mr. Hutchison broke through the covering of the water-wheel after he had broken through.

A. I did.

Q. If your answer be in the affirmative, state how long after he had broken through, that you saw the place.

A. It was probably from 15 to 25 minutes.

Q. State whether or not you made an examination of the circular supports of the wheel-house covering.

A. I did.

Q. If your answer be in the affirmative, state the condition of the same, as to whether or not the same were decayed, and if so, to what extent.

A. The stringers or circular supports toward the center of the wheel-house where they attached to the stern of the boat proper, were very rotten, one of them appearing to be entirely rotted off prior to the accident.

Q. State, if you know, the thickness of the covering of the water-wheel.

A. It is a trifle less than an inch.

Q. If the lumber covering the water-wheel has a designation as to character, and you know what it is, state what it is.

A. Flooring lumber.

Q. State, if you know, whether or not the supports of the covering of the water-wheel broke.

A. Yes, several of them, three, four or five."

MR. LANGLEY: I think that is all the depositions, with the exception of the deposition of plaintiff in the case, and that is quite lengthy. I assume that the jurors are tired of depositions and I would like to ask the privilege of introducing that later in the case.

MR. LANGLEY: I have just the deposition, then of the mother. This is the deposition of Ella A. Hutchison, the plaintiff in the case. (Reads deposition of Ella A. Hutchison as follows):

"Q. What is your name, age and place of residence?

A. Ella A. Hutchison, age 59, Endicott, Wash.

Q. Are you the plaintiff in the case of Ella A. Hutchison vs. Willamette & Columbia River Towing Co., now pending in the District Court of the United States, for the District of Oregon?

A. Yes.

Q. Are you the mother of R. Verne Hutchison, deceased?

A. Yes.

Q. What was his age?

A. 24 years 8 months 18 days.

Q. Was he, or had be ever been married?

A. No.

Q. Is his father deceased?

A. Yes.

Q. When did his father die?

A. May 21, 1901.

Q. Did R. Verne Hutchison have adopted children?

A. No.

Q. Did R. Verne Hutchison leave a will?

A. No.

Q. Where did R. Verne Hutchison reside at the time of his death?

A. His home was Endicott, Washington, though

he was attending college at Pullman, Washington.

Q. State what educational attainments, if any, R. Verne Hutchison had.

A. He graduated from Endicott High School in May, 1909, taught one term in Endicott School; had completed the Freshman year in Washington State College and was just completing his Sophomore year in the same institution.

Q. Was R. Verne Hutchison attending college?

A. Yes, he was taking a course in Electrical Engineering in Washington State College at Pullman, Washington.

Q. If so, what particular studies was he pursuing?

A. Physics, calculus, machine design and shop work and English, besides vocal and instrumental music.

Q. Was R. Verne Hutchison industrious?

A. Yes.

Q. If your answer to the last question be affirmative, state his traits of industry, and what he may have accomplished by the exercise of his industry.

A. His habits of industry were such as to often call forth a protest, as he rose early and worked late while on the farm, and whether at work or study, he never left his task unfinished because it was a disagreeable one. He secured excellent grades in his college studies although my need of his services at home made it necessary for him to delay the beginning of his school work each year for several weeks after the opening of the school term. When

he came home, which was often, every week or two, he found something to work at for me nearly all the time he was with us.

Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son, R. Verne Hutchison?"

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

COURT: Very well, you will be allowed an exception.

MR. LANGLEY (Continues reading deposition):

"A. There had always existed between us the strongest affection and my pride in him and in his abilities was very great, while his love for me was more than is often seen between mother and son. He always came and gave me a goodnight kiss and never to my recollection did he speak disrespectfully to me, but was always patient and kind, with a ready smile, and sympathy for anything that hurt or annoyed me.

Q. What, if any, care, society and comfort was given you by R. Verne Hutchison, deceased?

A. His care of me physically, mentally and financially was always his chief aim. His was the arm I leaned on many times while on the street and for months, while I was an invalid, he wheeled me about in a wheeled chair, seeming to take the great-

est pleasure in so making it possible for me to go to church and enjoy the out-of-doors and sunshine. He was quick to see that I had the best chair, the most comfortable place, and many times kept from me the things about our affairs that would have worried or harassed me, so that I might be more free from care. He gave up four years of his cherished ambition to go to college, in order to take entire charge of the farm for two years and to have charge of same in conjunction with his brother for two more years. He would always say when difficulties seemed to be too much for us: 'Never mind, Mamma, I will work as long as you need me; you needn't worry about financial matters.' He was as good as his word in that, for we depended on him for everything done on the farm. He worked as I said, early and late, often rising before daylight and riding out to the farm four miles to get his own breakfast, then work in the field all day. When I was able I went out with him, but he has stayed three months at a time, doing his own cooking and living there alone. He never asked wages, and did not receive any wages, except sometimes for a few weeks during the rush season, working the most of the year for nothing to keep things going. When he came home from college, which he often did, though there were games, or other things he would like very much to have attended he always came cheerfully and worked either at the garden or lawn in town, or went out to work at the farm. We depended on him to transact any business connected with the farm. His

taking away leaves us a household of women, a sad, broken household, where his name can scarcely be mentioned without tears. His memory comes near to be a benediction to all who knew him."

Portland, Oregon, April 22, 1916, 10 A. M.

DEFENDANT'S CASE.

PETER MOHLER. Call as a witness in behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Now, Mr. Mohler, speak loud so that we can hear you. Where do you live?

A. I was born and raised in the western part of Ohio.

Q. How long have you been in Oregon?

A. I have been in Oregon since 1900.

Q. Speak a little louder, Mr. Mohler. How long have you been steamboating?

A. I first began steamboating in 1902.

Q. And since that time have you been engaged in that work more or less?

A. Yes sir.

Q. Were you working for the Willamette and Columbia River Towing Company on May 3, 1915?

A. Yes sir.

Q. In what capacity?

A. I was employed as a watchman on the Steamer Teal.

Q. On what steamer?

A. Teal—J. N. Teal.

Q. Were you on the boat at the time Mr. Hutchison was drowned?

A. Yes sir.

Q. What were you doing at that time?

A. I was watching the stairway leading from the promenade to the hurricane deck at the stern of the boat.

Q. Now, who did you take your orders from?

A. The first officer of the boat, the mate.

Q. You call him the mate?

A. The mate or the first officer, either one is proper.

Q. What orders had the mate given you in regard to this stairway?

A. To keep people off the promenade, or off the hurricane deck except the band, which would be seated up there after the boat left the landing.

Q. What were those orders, again?

A. To keep everybody off the hurricane deck except the band, which would be seated up there after the boat left the landing.

Q. What do you mean by after the boat left the landing—after it was loaded?

A. After it was loaded and got away from the landing.

Q. Now, did you see this accident?

A. Yes sir.

Q. Just state to the jury, what you saw and what happened.

A. Well, I had been placed there by the mate—

COURT: You will have to speak louder, you will have to raise your voice so the jurors can hear you.

A. Well, I had been placed there by the mate to keep the passengers and everybody else except the band, off the hurricane deck, the band would be seated after we left the landing and got out in the stream. There was a man and woman started up and I stopped him—the man was ahead, I stopped him perhaps on the second step from the bottom.

Q. Of what?

A. Of the steps going from the wheel house to the hurricane deck and the woman was at the bottom of the steps, perhaps had one foot on the steps and the other on the running board. These boys, college students, I understand, come up there with a rush, of course they could not take the plank on account of the man and woman being stopped there —they either climbed over the rail or jumped from the end of the plank that sets on the rail over on to the top of the wheel house—they came with a rush and of course the wheel house broke down and Mr. Hutchinson, I believe his name is, went through and was either killed by the accident, by the wheel, or drowned.

Q. How long had they been on the covering—on the roof before it went down?

A. Oh, not more than ten seconds, it went down almost instantly when they came out there.

Q. How many went onto the covering?

A. Seven or eight, I should judge.

Q. How were they dressed, in what kind of goods?

A. They were dressed in—I guess you would call it a light brown khaki.

Q. Did they have any instruments?

A. No.

Q. Did you know whether or not they were band boys?

A. No sir.

Q. Had you any way of telling whether they were?

A. No sir.

Q. Did you make any effort to keep them off the cover?

A. I didn't have a chance to, they came with a rush.

JUROR: Could I ask the gentleman where he was standing when this happened?

COURT: Yes.

JUROR: Where was you standing?

A. Right at the top of the steps.

JUROR: On the deck?

A. Yes.

JUROR: Up on the hurricane deck?

A. Yes sir.

Q. Now in regard to the sign being up there, was there a sign there by the stairs that sign there?

A. Yes sir.

Q. About people not coming up on the deck?

A. Yes sir.

Q. Was that there on the day of the accident?

A. It was there on the day of the accident.

MR. SENN: That is all; you may cross examine.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Did I understand you, Mr. Mohler, to say that you expected the band to go to the hurricane deck after the boat had left?

A. Yes sir.

Q. What was your purpose in waiting until after the boat had left?

A. So the men that were looking after the crowd on the bow would be at liberty to come up on the deck and help handle it.

Q. Now, as I understand you to say, you were up on top of the hurricane deck yourself?

A. Yes sir.

Q. And your purpose in being there was to prevent people from coming to the hurricane deck, was it?

A. Yes sir.

Q. And did you see others on the hurricane deck at that time?

A. There was Mrs. Riggs, the captain's wife, and possibly Mrs. Fields, the chief engineer's wife.

Q. You are positive that they were the only people up there?

A. Yes sir, outside of perhaps—well there was the watchman at the forward ladder there was a watchman there.

Q. Do you know a man by the name of Stebbins living in Lewiston?

A. No sir.

Q. You don't know a lady by the name of Miss Lowry?

A. No sir.

Q. You don't know a gentleman by the name of Dell Wilson?

A. No sir.

Q. You don't know a lady by the name of Miss Armstrong?

A. No sir.

Q. You do know a lady by the name of Mrs. Stebbins?

A. No sir.

Q. Where are you employed at the present time?

A. On the Steamer Teal.

Q. On the Steamer J. N. Teal?

A. J. N. Teal, yes sir.

MR. LANGLEY: I think that is all.

(Witness excused.)

CHARLES E. STEELSMITH. Call as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Steelsmith, where do you live?

A. Portland, 795 Corbett Street.

Q. Talk loud, so His Honor and the Jury can hear you.

A. 795 Corbett Street, Portland.

Q. How long have you lived in Portland?

A. Twenty-five years.

Q. What is your business?

A. I am employed by the Willamette and Columbia River Towing Company in their passenger and freight.

Q. How long have you been working for the company?

A. Eleventh of August, 1915; no, 1914.

Q. Were you at Lewiston at the time of this accident?

A. Yes sir.

Q. What were you doing there?

A. I was up there as a representative of the company in looking after matters that might come up. Be on the ground.

Q. Now, just explain the occasion of the boat being up there.

A. The Steamer Teal was sent up there on a regular run in time to arrive there for the occasion of the Lewiston Celebration of the opening of the Celilo Canal. The Commercial Club of Lewiston had arranged for a series of excursions on that day, as a sort of diversion for the crowd that might be in the city, and they had arranged to have an excursion, or for a boat to leave the dock at one o'clock at three and at five, giving them parties a short ride. The one excursion had left the dock and returned—one excursion—one trip had been completed. In loading for the second trip the accident occurred.

Q. Now, who made this arrangement with you about making these trips?

A. The transportation committee of the Commercial Club of Lewiston.

Q. There has been a pass introduced in evidence here, by Potvin—or something like that.

A. Yes sir.

Q. Who is he?

A. He was secretary of the Commercial Club at that time or secretary of the transportation committee, I am not sure which.

Q. What arrangements were made about the band?

A. There were no arrangements made by us other than Mr. Potvin informing me in the morning that there would be a band for each trip, which was to furnish the music and they were to be passed free of charge and taken care of. And they were assigned by him or by some one not of the committee, I don't know who assigned them or who gave them a pass, that was simply the identification, as I take it, to show that they were the band to go.

Q. Now, you didn't see the accident?

A. No, I didn't see the accident.

Q. You don't know anything about how it happened except hearsay?

A. Only hearsay.

Q. Now, Mr. Steelsmith, where were you prior to the boat leaving on this second trip, and what were you doing there?

A. At the particular time when the boat landed,

the planks were put out and the gates put up and the crowd—I suppose there were perhaps two thousand people on the beach there, a big crowd of people, and at once when the planks were put out they closed up around the end of the planks and we opened—asked them to step aside that the people might get off that had made the trip. They did so and as the crowd came off and the last of the party were ashore they closed in on the planks again to go aboard, and I stood at the upper end of the planks and sort of let them—kept them in order—to keep them in order told them there was no hurry and to take their time to go aboard, and avoid the rush, the crowd.

Q. You were at the end of the plank that was on the shore?

A. Yes sir, I was standing on the beach.

Q. Just explain the nature of these planks, how wide they were and how long.

A. The jury walked—I would not say the identical planks, but similar, they are landing stages approximately four feet long and three feet and a half wide three feet wide, each.

Q. Like the jury walked over yesterday?

A. They walked over similar planks.

Q. Now, you spoke something of some gates, what do you mean by gates?

A. There was a gate set up on the outer side of each plank stock gates.

Q. How high are these gates?

A. They are like a panel of fence, probably twenty feet long and four feet and a half high.

Q. They are used as a sort of rail.

A. They are used on the boat for the purpose of fencing off stock, or in case of excursion, putting around the bow, or as the purpose was used there, for protection, a man stood at each end of them and held it up while the crowd passed between.

Q. Now, you were at the shore end of the gang plank as I understand, was there anyone at the boat end of the gang plank?

A. The mate and the purser.

Q. The mate and the purser?

A. Yes sir, they were there to take up tickets and count the passengers.

Q. How many passengers were you allowed on this trip?

A. We were allowed three hundred regular and a permit for fifty, made three hundred and fifty.

Q. Who gives you those permits—allowance?

A. The local inspectors.

Q. United States Government inspectors?

A. Yes sir.

Q. Now, in regard to these band boys or these boys that came down, just explain to the jury when you saw them on the bank, when they started?

A. Well, the first conversation that I had with the band was in regard to which band should go. There were apparently two bands there. The Pullman Band—I don't know their name, but they were understood to be the Pullman College Band; there was also the band in blue uniform known, I think, as the Whitman County Band, but our agent at the

ticket office called me to one side, saying that there seemed to be a mixup on the band question, which band was to go, and after the boat had left the first trip, he sold the tickets for the second trip up to three hundred, the people were clamoring for tickets, and to avoid the rush and enable us to get away quick, he sold the tickets for the second trip after the first trip. These boys were I should say, twenty-five or thirty of them. The two bands were arguing which band should go and I was called into the controversy and I said to them—the one that seemed to be the leaders, I said "Boys, it don't make a bit of difference to us which one of you go, but the fact is we cannot take both of you for the reason we have sold too many tickets and we are only allowed 350 and have sold 300, and you say there is 35 or more in your organization, in each, so we can take only one of you, so you will have to decide which goes." So they both argued, they had a concert at five o'clock and so on, which didn't interest us, the facts were we couldn't take but one band. I went back to the plank after this conversation with the boys and the crowd had got ashore and the others had started aboard. And about that time I saw some of the young fellows in blue uniform get into an automobile and start away and immediately the other crowd came down—down the incline or the bank, there is a sloping bank there. They came right through the crowd in a body, or in a bunch, and as they neared me I said to one young fellow who was there, I said "Well you decided to go, did you, boys?" and he said yes,

they did, and I called out to the mate and purser to pass the boys in khaki uniform, which they did as they went up the plank. As they came down this incline toward the end of the plank they came down there with a rush and the people that were between them and the end of the plank, some of them were still getting aboard and some were pressed to one side or the other, and I should there was probably eight or ten, maybe got by, and the rush—the gate toppled over and caused a commotion there and I reached through and got the man's hand on the other side and stopped him. I said "Boys, no occasion for this hurry, you have lots of time, you will have somebody in the river, you must be careful," and the gate was immediately straightened up and they proceeded —went up.

Q. Did they have their instruments with them?

A. No sir.

Q. You say there were probably two thousand people along the shore?

A. I should say there was that many sightseers. I don't know. I guess it was—an estimate.

MR. SENN: You may cross examine.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. I understood you to say that you are now in the employ of the Willamette and Columbia River Towing Company?

A. Yes sir.

MR. LANGLEY: I think that is all.

(Witness excused.)

ARTHUR DAVIS: A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. SENN:

Q. What is your business, Mr. Davis?

A. River mate.

Q. Who are you working for at the present time?

A. The government employ at the present time.

Q. United States Government?

A. Yes sir.

Q. Were you working for the Willamette and Columbia River Towing Company at the time of this accident?

A. Yes sir.

Q. What was your position?

A. Mate of the J. N. Teal.

Q. Where were you stationed at the time that the people came across the gang plank onto the boat?

A. On the bow of the boat at the end of the planks.

Q. And what were you doing?

A. Counting the people as they came aboard, helping the purser take tickets.

Q. Who had you stationed at the stern of the boat near the stairway?

A. Mr. Mohler.

Q. Mr. Mohler also testified to a watchman being at the front stairway on the hurricane deck.

A. Yes, sir, a boy by the name of Charley Long. I don't know where he is now.

Q. Do you know whether he is in this country—Do you know whether he is around Portland?

A. He is like deck hands he drifts around—I could not say where he is, he may be in Seattle or Portland—I could not say.

Q. Where was he stationed?

A. At the port side.

Q. Is that the—that is near the captain's cabin at the front of the boat?

A. Yes sir.

Q. That you mean was when you passed on the right?

A. Yes sir.

Q. As I understand he was at that stairway?

A. Yes sir.

Q. You didn't see the accident?

A. No sir.

Q. Did you notice any commotion, or anything at the other end of the gang plank about the time the boys—

A. The gate started to fall over and I was kind of standing on the side and reached over and grabbed it and still counting and taking tickets. We got straightened up and I could not see anything but the band boys coming aboard. I asked them if they were band boys.

Q. Did these boys have any instruments?

A. No sir.

Q. How about the size of the crowd on the bank, was it small or large?

A. Large crowd.

Q. How long have you been steamboating?

A. About sixteen years.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. I don't know that I got your name.

A. Arthur Davis.

Q. You were the mate on the boat J. N. Teal on May 3, 1915?

A. Yes sir.

MR. LANGLEY: That is all.

(Witness excused.)

ARTHUR RIGGS. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. What is your business?

A. Master and pilot, inland steamers.

Q. And how long have you been a pilot?

A. I have been a pilot for about sixteen years.

Q. Pilot is about the same thing as captain on the boat?

A. Well, I had the pilot license before I was master's I had master's license about two years.

Q. How long have you been steamboating?

A. Twenty eight years about.

Q. Twenty eight years and for what companies have you—

A. Well, different companies most all of them on the Columbia and Willamette Rivers—Alaska.

Q. You have operated on the Willamette River a good deal?

A. Yes sir.

Q. Were you the captain or pilot of the J. N. Teal at the time of this accident?

A. Yes sir.

Q. Where did you take the boat from?

A. From Portland.

Q. When did you start?

A. From Portland, the Taylor Street dock.

Q. Now where—you didn't see this accident as I understand?

A. No sir.

Q. Where were you at the time?

A. In the pilot house.

Q. At the wheel of the boat?

A. Yes sir.

Q. Could you see the crowd on the bank?

A. Oh, yes, I could see the crowd on the bank.

Q. What size crowd was it—whether it was a large crowd or small crowd.

A. Oh it was a large crowd, I could not say how many.

Q. Where was Mr—whose duty is it to station watchmen—yourself or the mate's?

A. Well, it is the mate's duty through my orders.

Q. At the time of this accident, did you see anybody on the hurricane deck?

A. Well, I see the men that were assigned there and parties of the crew that were off duty—there were several of them.

Q. Where was your wife?

A. Sir?

Q. Where was your wife at that time?

A. I could not say.

Q. You didn't see her?

A. No I was busy in the pilot house.

Q. Now, Mr. Riggs, the covering of this wheel, what is its purpose to cover the wheel—what is the purpose of the covering of the wheel?

A. Well, it is for a good many purposes, for to help the looks of the boat some of them think, it doesn't protect the wheel itself more than an ornament than anything else.

Q. What is the main reason—about throwing the water on the boat?

A. It breaks the spray too, that is one purpose.

Q. To keep the water from being thrown up over the boat?

A. Yes that is one of the reasons.

Q. Was is ever built or constructed for the purpose of having anyone walk over it?

A. No sir.

Q. Did you ever see any passengers or anybody except employes on it?

A. Yes, I have seen them on there and chased them off of there a number of times.

Q. Now, how is it shaped, as to whether it is rounding or square?

A. Rounding.

Q. What is it constructed of, do you know?

A. Thin fir ceiling.

Q. What is it?

A. Thin fir, I should say half inch. I would not be positive as to that but it is very thin lumber.

Q. You never examined it closely?

A. No, not right closely.

Q. How long had you been running the J. N. Teal before the accident?

A. Well, I just took command that trip. I had been in command of the Steamer Inland Empire and I was called from Celilo to Portland to take charge of the Teal. I arrived in Portland and went right out on the Teal.

Q. Did you see these boys come aboard?

A. I seen them on the shore.

Q. How did they come down the gang plank?

A. Well, I could not say. I seen the rush and commotion out there and I seen Mr. Steelsmith with his back to the boat and his hands up this way, and he said, "take your time you will have plenty of time." That is about all I noticed there. I noticed the planks fall.

Q. Noticed what?

A. The planks fall or starting to fall.

Q. You mean the gates?

A. The gates, yes, I should say the gates.

MR. SENN: That is all.

MR. LANGLEY: That is all.

Questions by the Court:

Q. Did you have charge of that part of the boat where those boys got onto the wheel covering?

A. I have charge of the whole boat.

Q. You have charge of the entire boat?

A. Entire boat, yes sir.

Q. Was it your purpose on that day to keep people off that covering?

A. It was my purpose to have men there to do it.

Q. What is that?

A. It was my duty to have men assigned there.

Q. And there was a board put out for people to walk out to the foot of the ladder?

A. Oh, yes, there is a plank.

Q. And was that put out for the purpose.

A. Oh, no, it was permanent.

Q. That is a permanent board?

A. Yes, it is a permanent board.

Q. Was that put there—I mean for the people who went aboard the boat to use or was it put there for the officers.

A. It was put there to get to the life boats and the officers and crew. When they were allowed up there—I mean passengers when they were allowed up there, they would go that way. Yes sir.

Q. Then it was usual to allow passengers to go up that way to get on the hurricane deck?

A. When I seen fit, yes, when I seen fit and things were roped off proper for passengers could let as many as I seen fit.

Q. How did you rope off?

A. By stringing the line about the pilot house and around the hog posts and inside of the davits.

Q. Did you rope that off so that they could not get off?

A. Yes, out to the edge of the ladder.

Q. Was it roped off this day?

A. Yes sir.

COURT: That is all.

QUESTIONS BY MR. SENN:

Q. I will ask you whether the Government requires the stairway there?

A. Sir?

Q. Government regulations require a stairway?

A. Yes, they do.

Q. The purpose is to get to the life boats?

A. Yes sir.

Q. The fire drills?

A. And fire drills, yes sir.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Now, you stated in reply to a question asked by the Judge, that it was roped off. I wish you would explain where it was roped off, where there was any ropes there.

A. The ropes were around the pilot house and to the hog posts right on around and take in the life

boats, and the band was supposed to be stationed, and was stationed right in between the life boats—the life boats were on the outside.

JUROR: Just what do you mean by the life boats?

Q. Let's get that clear. That roping off was on the upper deck, was it not?

A. Yes sir.

Q. It had nothing at all to do with the covering of the water wheel?

A. Not at all.

MR. LANGLEY: That is all.

MR. SENN: That is all, Mr. Riggs.

(Witness excused.)

E. W. SPENCER. Called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Where do you live?

A. 541 East 12th North, City.

Q. What is your business?

A. I have been master and owner of boats, haven't any just now, I have retired from business.

Q. Been in the steamboat business for many years?

A. Steamboating this river, yes sir.

Q. Were you at Lewiston, at the time of this accident?

A. I was.

Q. On what boat were you?

A. I went up with a delegation from the Chamber of Commerce. I belong to the Chamber of Commerce—from here on the opening of the river, on the Undine, Steamer Undine.

Q. Who was that boat run by?

A. Well, she is owned by Hosford Transportation Company at present.

Q. As I understand, a good many companies sent boats up there. You had eight or ten boats?

A. There was five boats, I think, lying there at the time, O. R. & N. Co., boats and Hosford boats; government had one or two boats there.

Q. United States government?

A. Yes sir.

Q. How far was the Undine from the J. N. Teal, at the time of this accident?

A. We were lying there above the wharf—we docked at Lewiston in the Snake River side. There are two rivers there. Clearwater and Snake River, and we were lying head up stream, with our port side to the beach, and the J. N. Teal came down from—she had been up on one excursion and she came down and landed bow down with her starboard side to the beach, about twenty feet above us—above the bow of the Undine. The two boats were about twenty feet apart.

Q. Where were you standing—or where were you at the time the crowd came aboard the Teal on the second trip?

A. I was sitting on the bow of the Undine on the bitts.

Q. On the what?

A. On the bitts, they call them, that they make the lines fast to.

Q. Did you see the crowd?

A. I saw the people going off the Undine, or off the J. N. Teal, and a large crowd on the beach and my attention was attracted to the people going aboard of her—of the Teal.

Q. Did you see any boys in khaki suits coming—

A. That is what attracted my attention over there. About twenty five or thirty young men in brown uniform, I don't know whether they were khaki or not. They came down in a body, one behind each other, in quite a hurry to get aboard and the gang, when the gates fell there—had them on each side of the gang-ways, started to fall, and the men caught it and they stopped the crowd from going aboard so fast—the mate and the collector, or purser, whoever he was there at the gangway on board of the boat.

Q. What is the purpose of the covering of the wheel, Captain?

A. Well, it is more to keep the spray from the wheel blowing all the back end of the cabin than anything else, and it is quite an ornament to the stern as well—covers up that large wheel there.

Q. Is it built for the purpose of walking on it?

A. No sir.

Q. Well, is that apparent to a person of ordinary intelligence, to look at it he could tell that it is not built for the purpose of walking on it?

A. It is built very lightly, or about one by six tongue groove flooring, with a light frame underneath, and they usually have—the government provides that they shall have a stairway back there from the crew or passengers to get on the upper deck in case of accident, more than anything else. that back stairway is there.

Q. Is that stairway built according to government regulations?

A. They compel us to have two .gangways, above, one forward and one back to get on the upper deck.

Q. Where do they keep the life boats?

A. On the upper deck—hurricane deck.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Captain, in case of necessity of using the life boats would it be necessary to use the stairs leading up to the upper deck?

A. Well, that is the quickest way up. There is another stairway from the engine room up to the boiler deck—the cabin deck, but then that one is the nearest, over the wheel house, the roof, to the life boats. Of course there is a ladder forward. They go up both ways.

MR. LANGLEY: That is all.

(Witness excused.)

JOHN SPONOGLE. A witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Were you working on the J. N. Teal at the time of the accident?

A. Yes sir.

Q. Where were you stationed?

A. On the bow, sir.

Q. How long have you been steamboating?

A. About six years.

Q. What was your business in the bow of the Teal?

A. Helping there to keep order for the passengers coming aboard the boat.

Q. Were you near Mr. Steelsmith?

A. No, sir, I was on the bow of the boat and he was on the beach.

Q. Who else was on the bow of the boat, of the crew?

A. I forget the other man's name.

Q. Was the mate there?

A. Yes sir.

Q. Was the purser there?

A. Yes sir.

Q. Did you see the boys in brown suits form on the bank?

A. Yes, I believe I did.

Q. How did they come down to the boat—in what fashion?

A. Indian style, behind each other.

Q. How did they have their hands?

A. On each other's shoulders.

Q. How did they walk down to the gang plank?

A. Well, they came down in a very disorderly style; they were crowding considerable.

Q. What kind of a step did they come down, as you call it.

A. I don't know what kind of a step you would call it.

Q. Lock step?

A. Lock step, something like that, yes.

Q. Did they create any commotion when they got to the end of the gang plank?

A. Yes, then commenced to crowd people off to the gates?

Q. What happened to the gates?

A. They fell down.

Q. Do you remember what Mr. Steelsmith did about stopping the crowd?

A. Yes sir, he threw out his hand and grabbed the other man's hand that was holding the gate, to stop them.

Q. Did they have any instruments with them?

A. Not that I see.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. State to the jury which end of the line it was that was causing the commotion?

A. The first end of the line.

Q. The first end of the line?

A. Yes sir.

Q. And this commotion you state broke down the gates?

A. Well, it caused the passengers to crowd; these fellows were crowding them off.

MR. LANGLEY: I see; that is all.

(Witness excused.)

F. B. JONES. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Jones, where do you live?

A. Live in Portland.

Q. Speak loud so the—

A. I say I live in Portland.

Q. Judge, His Honor and the jury can hear you. How long have you lived in Portland?

A. I have lived here for thirty five years about, I guess.

Q. And what has been your business?

A. I have been steamboating most of the time, all the time.

Q. What position do you occupy with the Willamette and Columbia River Towing Company?

A. Yes, Willamette and Columbia River Towing Company. I am kind of manager now. I used to run the boat myself, but I don't run any boats now.

Q. You are president of the Company?

A. Sir?

Q. You are president of the Company?

A. Yes sir.

Q. As I understand you used to operate boats as a captain.

A. Sir?

Q. Have you ever acted as captain or mate?

A. Yes, I acted as captain for thirty years, I guess, pretty near.

Q. What is the purpose of the wheel house covering, Mr. Jones?

A. Well, it is made out of—the frame, the circulars are sawed gross grain, you know, and then they are lapped up so they are pretty strong and then the covering is about three-fourths stuff by about four inches wide. It is mostly often cedar but I think this is fir. Sometimes it is fir and sometimes they put cedar on. They are put there for the purpose of keeping the water, the spray from the boat, running in the wind, and water flying all over the boat. If you don't have a wheel house to keep it down, principally for that, and of course it helps the looks of the boat some. It ain't the purpose of anybody to go on except a man to wash it off or paint it or something.

Q. Is there any occasion for anybody to go on the wheel-house, except for the purpose of cleaning it, or repairing the wheel-house?

A. No, no occasion at all. The wheel house is built of fir, light construction work, on account of

being way back on the hind end of the boat and if you have them heavy it puts the stern down in the water, and you have to build everything as light as you can back there and make it as strong as you can with light work.

Q. Now, is it built for the purpose of having anybody walk on it?

A. Oh, now, it ain't calculated for more than one or two persons on it at a time. It ain't supposed to have.

Q. How is built flat or rounding?

A. Built rounding—oval.

Q. Now, Mr. Jones, was your boats, this boat, inspected by the Government Inspectors?

A. Yes sir.

Q. How often do they inspect the boat?

A. I believe they come around every three months now. They used to every year, but in the last few years, they have been coming around every three months, inspecting them to see if everything is kept up.

Q. What do they inspect, stairways?

A. Inspect everything, stairways, and notices and everything on the boat.

Q. Signs on the boat, notices?

A. Yes sir, everything. They don't leave nothing undone. If there is anything undone, they get after it.

Q. Do you know whether your boat was inspected before it went to Lewiston on that trip?

A. Yes, I recollect that the inspectors met us in

The Dalles when she got there, to see how many passengers she was carrying and how she was, if she had her equipment, and went aboard of her at The Dalles on that trip when they went up.

Q. Now, do these inspectors inspect the wheel house covering and stairways?

A. Oh, yes, if the wheel house cover looks bad or broke or anything, they make they fix it—repair it up.

Q. During that inspection did the United States Inspectors pass the wheel house and stair?

A. Yes, they passed the whole boat. They went all over it and passed the whole thing. They didn't find any objection to anything.

Q. If there is anything wrong, what do they do?

A. They say "Fix it before you go out."

Q. Make you fix it before they allow you to leave?

A. Say "Fix it before you go out," that is what they tell us and we have got to do it.

MR. SENN: You may cross examine.

MR. LANGLEY: That is all.

(Witness excused.)

MR. SENN: May we have a recess for a few minutes, that will be all the testimony we have. There is one witness we expected, but he has not arrived, and if he doesn't come in a minute or two we will close.

COURT: Have you rebuttal?

MR. LANGLEY: Yes, we will have rebuttal, simply as to the matter of commotion here, that is all.

CHARLES GREGORY. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Gregory, where do you live?

A. 484 Union Avenue.

Q. How long have you lived in Portland?

A. Thirty three years.

Q. What is your business?

A. Ship carpenter.

Q. Ship—

A. Carpenter, yes.

Q. How long have you followed that work?

A. Oh I followed the carpenter work for thirty three years.

Q. How long in Portland?

A. Thirty three years in Portland.

Q. How long have you been working for Mr. Jones and the Willamette and Columbia River Towing Company?

A. Well, all last year, I know. I could not tell exactly the time I went there. I left the Vancouver Transportation Company at the time they sold out to the Hosford Transportation Company, and I don't just know when it was exactly, but—

Q. Well, did you repair the covering over the Teal?

A. I did.

Q. After it was broken last May, 1915?

A. Yes sir.

Q. What is the covering made of, what kind of wood?

A. The covering is 1x4 flooring.

Q. What kind?

A. A tongue and groove?

Q. What kind of wood, pine?

A. Fir.

Q. Now, the sleepers that hold the covering?

A. They were circular.

Q. Yes?

A. They are cut out of 1x4—they are lapped together as (illustrating) nailed very close together about 6 or 8 inches apart, stagger them to bind.

Q. What kind of wood.

A. It is fir.

Q. Same kind—

A. Yes, have to saw them out.

Q. Now, did you see any of the old piece, or refuse near where they had broken off?

A. Yes, they were there, the pieces were broken and were there when she came in.

Q. What was the condition of the wood?

A. The condition of the wood was good, I consider.

Q. What is the fact as to whether, when a board or piece of wood is water soaked, and wet for a long time, whether it will splinter when you break it or whether it will break straight through?

A. Oh, no, from being wet it won't splinter up.

Q. Was it decayed or rotten?

A. No.

MR. SENN: You may cross examine.

MR. LANGLEY: No cross examination.

(Witness excused.)

COURT: Is that your last witness?

MR. SENN: That is all.

COURT: Call witnesses in rebuttal.

Defense rests.

REBUTTAL.

RANDALL RAY TUTTLE. Recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Mr. Tuttle, you have heard the testimony of these gentlemen who have testified that there was commotion there?

A. Yes sir.

Q. I wish you would state whether or not, there was any commotion or crowding on the part of those members of the band of which you were leader?

MR. SENN: Your Honor, we object to that, as not proper cross examination.

COURT: You have been over that.

MR. LANGLEY: I thought so, but I wanted to refresh it in the minds of the jury. If the Court so considers it—

COURT: I don't think it is necessary.

MR. LANGLEY: Very well, we will excuse you, Mr. Tuttle. That is all.

COURT: Is that your case?

MR. LANGLEY: Yes.

(Witness excused.)

Whereupon proceedings herein adjourned to 2 P. M.

Portland, Oregon, April 22, 1916, 2 P. M.

MR. SENN: Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground there has not sufficient evidence been introduced to submit to the jury, and, second, the evidence shows the deceased took this position voluntarily, without order or directions from anyone and was guilty of contributory negligence.

COURT: Very well. The court will overrule the motion.

MR. SENN: And allow an exception.

COURT: You may have your exception.

INSTRUCTIONS.

Now, Gentlemen of the Jury, you have heard the evidence in this case as it has been given to you from the mouths of witnesses and from the record, and you have also heard the argument of counsel, both pro and con, and now becomes the duty of the court to instruct you as to the law of the case; so that taking the law from the court, you may be enabled to apply it and thereby determine what your verdict shall be under the facts.

I will have to explain to you first, the issues that are involved and that which you have to try and determine. This is an action brought by Ella A. Hutchison against the Willamette and Columbia River Towing Company, a corporation. Ella A. Hutchison is the mother of R. Verne Hutchison, the person who lost his life on the occasion that has been detailed to you. Under the Idaho Statute this accident having occurred in the State of Idaho, the mother, who is the sole heir of the deceased, has the right to bring an action of this kind to recover for certain injuries; that is to say, injuries to her—that is, for the loss of companionship and society of her son.

Now, the complaint, leaving out the matters which are formal, and with which you have but little to do, simply alleges the sole heirship of the complainant; that is to say, that she is the sole heir of her son, E. Verne Hutchison, and that it alleges that at the date of death of R. Verne Hutchison, he was a resident of Endicott, State of Washington. That is immaterial. Then, again, that on the third day of May, 1915, while the steamboat J. N. Teal was in the Snake River and docked at Lewiston, Idaho, then being owned and operated by the defendant herein, R. Verne Hutchison was accepted by the defendant thereon as a passenger. That shows the relationship of the deceased to the defendant company. Then it is further alleged in paragraph VII. that said R. Verne Hutchison boarded said boat on the first deck and passed to the stern of said boat for the purpose

of ascending to the upper deck; that for the purpose of using certain permanent stairs, generally used as a means of ascending and descending, between the two decks, it became necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer; that while attempting to ascend said stairs aforesaid, the said covering over said water wheel broke through, letting said R. Verne Hutchison fell through said water-wheel into the water of the said Snake River and said R. Verne Hutchison was thereby drowned.

Now, that shows how the accident occurred. And then it is alleged that it occurred through the negligence of the defendant company and the negligence relied is set out as follows: First, that it failed to provide a safe landing or stairs from the first to the second deck. That is one item of negligence. Another item of negligence is that defendant failed to warn decedent not to use said stairs or not to go upon the covering of the said water wheel. Third, that by reason of that lack of warning or guards, and the presence of the stairs with a board leading from the railing of the lower deck to the base of landing of said stairs on said water wheel, defendant thereby held out an invitation to decedent to go upon the covering of the water wheel and use said stairs. Fourth, that the covering of said water wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used. And fifth, that defendant allowed or permitted passengers, and more particularly the decedent, to go up

on the covering of said water wheel: That the covering of said water wheel had been allowed to deteriorate in strength.

Now, Gentlemen of the Jury, that is the complaint in this case, and it is alleged that R. Verne Hutchinson was a passenger thereon, and the evidence tends to show that he entered upon the boat without a ticket, but with permission to enter and ride upon the boat. It makes no difference whether he paid his fare or was required to pay any fair, or failed to pay fare. He was nevertheless a passenger and must be treated as a passenger upon this boat.

Such is the cause of action alleged here. The basis of the action is negligence. Negligence on the part of the defendant company committed by it, and I will explain to you later on what is meant by negligence. Now, the plaintiff must recover upon the ground of negligence, alleged in the complaint, and she can recover upon no other negligence or no other cause, except such as is alleged in this complaint, and such negligence as I have read to you, that is charged by the plaintiff against the defendant.

The plaintiff has the affirmative of establishing the allegations of the complaint, and hence the plaintiff has the burden of proof, and that requires the plaintiff to establish her allegations by a preponderance of the evidence. What we understand preponderance of evidence is such evidence that causes the scales of justice to bear down upon one side or the other. If it bears down ever so little upon the side of plaintiff, then the plaintiff has established her

case by a preponderance of the evidence. If the scales of justice should stand at equal balance, then there is no preponderance and she could not recover, and, of course, if the scales stood with the balance upon the other side, the preponderance would be against the plaintiff.

Now, the defendant has interposed an answer to this complaint, first by denying these material allegations, and especially denying the allegations of negligence. That puts upon the plaintiff the burden of establishing those by a preponderance of evidence. The defendant has furthermore set up what is termed a further and separate defense, and that is an affirmative defense upon the part of the defendant company. That defense is in effect that the deceased was himself guilty of negligence, which negligence conduced to his own injury. This is one of the defenses that is interposed, and it is alleged in particular in what way he was negligent. It is said that R. Verne Hutchison—I will read further back: That on or about the 3rd day of May, 1915, the said Steamer J. N. Teal was at the boat landing at Lewiston, Idaho. That at said time the said deceased R. Verne Hutchison boarded said Steamer Teal; that thereupon said R. Verne Hutchison proceeded to the stern of said steamer and carelessly and negligently went out and upon the covering of the wheel of said steamer Teal; that said Hutchison has no right there or authority to go out upon said covering of said wheel and that Hutchison went out upon said wheel contrary to the orders and against

the wishes of the defendant; that because of the carelessness and negligence on the part of Hutchison, deceased, in going out upon said covering of said wheel, the said covering broke and said Hutchison was precipitated into the water and was thereby drowned. And then it mentions that he was careless in that respect, and that that carelessness contributed to his own injury.

It is further alleged that certain warnings were given, such as notice, and that persons were stationed to warn people away from the place, and to prevent people from being injured, and there is another defense also interposed in the same conjunction, which is that the accident happened without the negligence or the carelessness of anyone; that is, without the negligence of the plaintiff and without the negligence of the defendant, that it was a pure accident, and no one was to blame for it. Those are the two defenses that the defendant interposed here.

Now, I will instruct you as to the duty of a carrier. The defendant in this case is termed a carrier of passengers. It owned the boat and it was engaged in the business of transporting men, women and children, and therefore it is called a carrier of passengers. Such a person or such a corporation owes to the public a high degree of duty; that is, it owes to its passengers a high degree of duty to see that they do not meet with accident or injury.

Negligence, I will define to you, is the doing of some act or thing, which a careful or prudent per-

son would not do under like circumstances or conditions, or it is the leaving undone some act or thing which a careful and prudent person having in view the safety of others, would have done under like circumstances and conditions. Now, that is the definition in an ordinary case, but in this case, the defendant company owed to the passengers and owed to this decedent a higher degree of care than that. Some authorities say "A very high degree of care," but a carrier of passengers is charged with a higher degree of duty than this. Some of the books say a very high degree of care, diligence and foresight, "and some the very highest degree of care," and so forth. The true rule to my mind is this: "That the carrier is required to exercise that degree of care, commensurate to his undertaking, and in view of the circumstances and conditions attending the service he has assumed to render. To illustrate: The defendant company operates a steamer, propelled by a steam power; it operates a boat at a high rate of speed, or as fast as the circumstances will permit of its operating such a craft. The defendant carries large numbers of people and persons of all ages, men, women and children of varying judgment and discretion. Now, having engaged in such an undertaking the law imposes upon the carrier that degree of care, foresight and prudence commensurate with the undertaking to see that the passengers shall be protected against accident and danger. This means a high degree of care, and circumspection. It may not mean the very highest degree of

care, but it does mean such a high degree of care, altogether commensurate with the danger to be anticipated by careful and prudent and experienced persons engaged in that kind of business to see that the passengers or those who are entrusted to their care or who take passage upon the boat shall be protected against injury and accident. While the carrier is not an absolute insure against accident, he is charged with the kind of care and prudence and foresight I have endeavored to explain to you.

When, however, he has exercised the care imposed upon him, such as I have indicated, he has discharged his whole duty, and if accident happened without his fault in the particulars I have explained he is then not liable, but if he fails in his duty in this regard and accident does happen, and that accident is the proximate result of his negligence or carelessness or his failure to exercise that degree of care, then he would be liable. You must understand, gentlemen of the jury, that the negligence that I speak of here, must be the proximate cause of the injury complained of; that is to say, the cause without which the injury would not have happened.

Now, to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go, or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about

the boat in order to prevent the crowd from going into dangerous places; and to this end, it should give proper warning of danger and peril.

It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place, that place should be properly guarded by barriers and guard-rails and ropes so as to prevent intrusion beyond the limits of the passage way, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel, and determine its conditions; you will take into consideration the walkway passing back to the foot of the ladder, and how that was arranged, and you will take into consideration, the way in which they got from the walkway onto the ladder, and then you will determine whether, under the conditions and circumstances the way was properly protected so that people would not get into danger. Determine first, whether it was dangerous to go out upon this covering, and then, second, whether it ought not to have been protected differently from what it was, and then you will determine from all, that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises.

Now, then, as to the defense. Defendant says that

the deceased was himself negligent. That he went into a place of danger and by reason thereof, was killed. Now the deceased was required to exercise ordinary care and prudence for his own safety. He was required to use his senses, to use his eyes and look about and to see the conditions and determine for himself whether or not there was danger, and if he saw that there was danger, why, then, he should not have gone into it. And so you will determine in this case, whether or not the deceased himself has been guilty of negligence. I speak of ordinary negligence here, because he was only charged with the ordinary degree of care and foresight, not the highest degree of care, as the defendant is in this case, but he is charged with the exercise of ordinary care and foresight for his own protection.

Now, there is a rule, gentlemen of the jury, which I will call your attention to and it applies in this case. If the deceased was guilty of negligence contributing to his own injury, he could not recover, although it might appear to you from the evidence in this case that the defendant was negligent, in the premises, because of the negligence of the deceased, would be the one nearest to the accident. It would be the nearest cause to the accident, the proximate cause to the accident, hence the rule that if the deceased was himself negligent, conducing to his own injury, he could not recover, although the defendant was negligent.

As to the second defense, I will advise you gentlemen of the jury, that if it appears in this case that

the defendant was not negligent in any way and that the deceased himself was not negligent in any way, and that this injury that he received was a result of a pure accident, for which nobody is responsible, then, of course, the plaintiff could not recover.

Now, gentlemen of the jury, you are the sole judges of the effect of the testimony. The Court gives you the law and you take that implicitly from court, and you apply it and must determine what facts have been proved and determine what the effect of the testimony is and thereby you will determine what your verdict should be.

This rule is not an arbitrary rule, but it is a rule to be observed in obedience to the rules of evidence. For instance, the testimony of several witnesses is not to be taken absolutely as proving the fact, they testified to as against a lesser number of witnesses, but you are to be guided by the conviction that the testimony shall bring to your minds and it might happen that the testimony of one witness will weigh more with you than the testimony of half a dozen, and so it is for you to judge as to the weight of the testimony by the conviction that it brings to your intellects.

Now, a witness is presumed to speak the truth, but this presumption may be overcome by the manner in which he testifies and by the character of his testimony and by testimony going to his character, or his motives or by contradictory evidence. A witness found to be false in one particular is to be distrusted in others, and also a person's evidence may

be effected by the interest which he may have in the case or in other surrounding or attending circumstances. And so, taking into account all these, you will determine the credibility of a witness; you may take note of the witness as he apepars upon the witness stand and observe whether he appears to be speaking truthfully and desires to have you have the whole testimony or the whole facts in the case, or whether he seems to be reticent and is reserving something, and thereby you will determine as to that particular witness what credibility he is worthy of and you will give him the credibility accordingly as he demands. And thus by determining the credibility of the witness, in the end, you will determine what the effect of the testimony is and therefrom you will make up your verdict.

Now, gentlemen of the jury, that leaves but one other question for me to instruct you about, and that is the measure of damages.

Now, this case is based for the amount of damages to be assessed, if you should find for the plaintiff, upon the loss of companionship and society. The plaintiff is the mother of the deceased and that the relationship that you have to consider and hence you will take into consideration certain matters in determining that. In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of the intimacy existing between the father and the child—in this case the mother and the child—and the loss of companionship and society, if such shall be shown, to-

gether with what expenses may have been incurred as shown by the evidence, by the mother for the funeral and medical expenses. There have been no such expenses proven here, and this depends altogether upon the loss of the companionship and society that the mother has sustained by reason of the death of this child. And you will have to determine that by money value as near as you can, and say from all the evidence in the case, and the relationship of these parties the amount that you shall render.

You may take into consideration, also, the age of the son, when he was killed and you may take into consideration his expectancy of life, which it is stipulated here is thirty-nine years, and all these matters you will take into consideration in determining what you shall say the money value of the loss of companionship and society has been to his mother.

Now, gentlemen of the jury, there is one other thing that I will speak to you about and that is, what the Court may have said at any time, during this trial, from which you might infer that the Court has an opinion as to what the testimony proved, as a matter of fact, that you will disregard because that is outside of the province of the Court, and is wholly within your province, therefore you will find your verdict as to the facts independent entirely of what the Court may have said leading you to infer any such judgment on the part of the Court.

COURT: Gentlemen, have you any exceptions to say?

MR. LANGLEY: We have no exceptions, Your Honor.

COURT: Mr. Senn:

MR. SENN: Just to those instructions requested and not given by the Court, and instructions of the Court that the ship was not properly officered, and also where the Court said to prevent people from going to dangerous places, or to prevent intrusion, or if the roof should be protected differently.

COURT: Yes, very well. You may qualify the officers.

(Officers sworn.)

INSTRUCTIONS REQUESTED BY DEFENDANT.

The plaintiff brings an action to recover damages on account of the death of her son on May 3rd, 1915. The plaintiff alleges and claims that the defendant was careless and negligent in that it carelessly and negligently failed to provide a safe passageway from the first to the second deck, or what is commonly known as the "hurricane" deck. Also that the defendant was careless and negligent in not warning the deceased, R. Verne Hutchison, of the danger of going upon the covering of the water-wheel; also that the defendant company was careless and negligent in that it had no warning signs or guards; and because the covering of the water-wheel was not sufficiently strong; and that defendant carelessly and

negligently allowed the deceased to go upon the covering of the water wheel. These are the allegations or claims of negligence on the part of plaintiff.

The defendant company admits that it is a corporation of the State of Oregon, and admits that R. Verne Hutchison was drowned by falling through the covering of the wheel of the Steamer J. N. Teal; the defendant also admits that it owned and operated the steamer known as the J. N. Teal, but the defendant company denies that it has been careless or negligent, or that its carelessness or negligence in any way caused the death of the deceased R. Verne Hutchison.

The defendant company alleges that R. Verne Hutchison was careless and negligent because of the position he took upon this water-wheel, and because he went upon this water-wheel covering voluntarily without any orders or instructions from the defendant or the defendant's officers; and the defendant further alleges that so far as it was concerned the death of R. Verne Hutchison was wholly unavoidable and could not have been prevented by the exercise or the care required by law.

II.

This is an action based upon negligence. The plaintiff has alleged that the defendant company has been negligent and that this negligence caused the death of R. Verne Hutchison. Negligence is never presumed. The law in this case presumes that the defendant company performed its duty toward the

deceased, and that it was not negligent. In order for the plaintiff to recover damages in this case, it is necessary for the plaintiff to prove by a preponderance of the evidence the negligence of the defendant company, and that this negligence was the proximate cause of his death. If plaintiff does not prove that the defendant has been negligent by a preponderance of the evidence, or if you find that the evidence is evenly balanced, then your verdict must be for the defendant company.

III.

It is in evidence in this case, that there was a stairway running from the second to the hurricane deck of this boat, and it appears that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased, R. Verne Hutchison, to keep the covering of the wheel in good condition, provided this covering of the wheel was not intended to be used as a passageway

by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or a runway for passengers, then I instruct you there was no obligation on the part of this defendant company to keep in repair or condition this covering of the wheel, and your verdict must then be for the defendant company.

IV.

There is another rule of law to which I will call your attention, which is as follows: where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or a stairway from the second to the hurricane deck, and that this was a safe way by which to reach the hurricane deck, and that the deceased, R. Verne Hutchison, could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant.

V.

In this action, both parties were obliged to exer-

cise care. It was the duty of the deceased, R. Verne Hutchison, to exercise ordinary care to prevent being injured. It was his duty to use his senses and his faculties and to look and avoid being injured. If he could do so by the exercise of ordinary care, and if you find that as an ordinarily prudent person he did not exercise ordinary care, which is such care as a man of ordinary prudence would have exercised under like conditions, then the plaintiff cannot recover damages in this case, and your verdict must be for the defendant company.

VI.

If you find that deceased, R. Verne Hutchison, did not exercise that degree of care which an ordinarily prudent man would have exercised under like conditions in going out upon this wheel covering, and that this contributed to his death, then I instruct you that the plaintiff cannot recover in this case, and your verdict must be for the defendant company. If you find that both parties were negligent; that is, if you find that the deceased R. Verne Hutchison was negligent and you also find that the defendant company was negligent, then your verdict must be for the defendant. That is, in accordance with the rule of law, which is to the effect that where both parties are negligent and their negligence contributes to the injury or death, in such case the law leaves the parties where it finds them and damages cannot be recovered.

VII.

There is another rule of law pertaining to the question of accidental injuries. Accidents may happen and no one be at fault. The most serious catastrophy may befall a person and yet it may be the result of what the law calls an accident, and in such case no one is at fault and no one can be held answerable in damages. So in this case, if you find that this was an accident in which no one was at fault, then I instruct you that the plaintiff is not entitled to a verdict, and you must find for the defendant. The defendant company was not an insurer of the safety of its floor or of this wheel covering and the mere fact that this wheel covering may have been broken at the time of this accident, and the mere fact that the deceased R. Verne Hutchison was precipitated through the opening and drowned is not in itself sufficient to entitle the plaintiff to a verdict. As I have before stated, this is an action based upon negligence and the plaintiff must prove by a preponderance of the evidence the negligence of the defendant company and that this negligence was the proximate cause of the death of R. Verne Hutchison.

VIII.

You must first consider whether or not the defendant company has been negligent and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as

heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages, because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages, you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss,

if any, which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of the deceased.

In the District Court of the United States for the District of Oregon.

ELLA A. HUTCHISON,

Plaintiff,

vs.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled action came on for trial on the 21st day of April, 1916, before the Honorable Charles E. Wolverton, Judge of the above entitled court, and a jury duly and regularly impaneled and sworn to try the issues of fact arising in said action; whereupon the plaintiff to prove the issues on her part, introduced the deposition of Dell Wilson, and among other things, the following proceedings were had:

I.

MR. LANGLEY: That is all of that deposition. (Reads deposition of Dell Wilson.) Reading: State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

MR. SENN: Just a minute, Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck, and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to have applied to the day of the accident.

MR. LANGLEY: If your Honor understands me, I don't mean by that that I am attempting to say that there was posted notice, by the depositions; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (Continues reading deposition):

"Q. State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to, state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the waterhouse.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and the band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify you saw other persons than

those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fifteen, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty.

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

Defendant by its counsel objected to the introduction of the foregoing testimony for the reason that same was irrelevant, immaterial and incompetent, which objection was by the Court overruled and an exception allowed defendant. (Deposition of Dell Wilson.)

II.

To further sustain the issues on the part of the plaintiff, the deposition of Ella A. Hutchison, the

plaintiff, was introduced and contained among other things, the following:

* * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son R. Verne Hutchison?"

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

THE COURT: Very well, you will be allowed an exception.

Defendant by its counsel objected to the introduction of the foregoing testimony for the reason that same was irrelevant, incompetent and immaterial and not a measure of damages and not an element, which objection was by the Court overruled and an exception allowed defendant. (Deposition of Ella A. Hutchison.)

III.

At the close of all of the testimony on behalf of both the plaintiff and defendant, defendant by its counsel moved the Court for a directed verdict, said motion being as follows:

MR. SENN: "Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground there has not sufficient evidence been introduced to submit to the jury, and second, the evidence shows that the deceased took this posi-

tion voluntarily, without orders or directions from anyone and was guilty of contributory negligence.

COURT: Very well; the Court will overrule the motion.

MR. SENN: And allow an exception?

COURT: You may have your exception.

That the Court, then and there overruled said motion and an exception was allowed defendant.

IV.

At the close of all of the testimony and after defendant's motion for a directed verdict had been overruled, defendant requested the Court to instruct the jury as follows:

"It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keepingk in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the

wheel in good condition provided this covering of the wheel was not intended to be used as a passageway by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering of the wheel and your verdict must then be for the defendant company."

Which instruction was by the Court refused and the defendant excepted to the ruling of the Court in refusing to instruct the jury as requested and an exception was duly allowed defendant.

V.

Defendant further requested the Court to instruct the jury as follows:

"There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or stairway from the second to the hurricane deck, and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which

was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant."

That the Court refused to give the foregoing requested instruction and an exception was duly allowed defendant."

VI.

That the defendant also requested the Court to instruct the jury as follows:

"You must first consider whether or not the defendant company has been negligent, and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far

as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss if any which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of the deceased."

That the Court refused to give said requested instruction and an exception was duly allowed the defendant.

VII.

That the Court then and there instructed the jury among other things as follows:

"Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard-rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then you will determine whether, under the conditions and circumstances, the way was properly protected so that people would not get into danger. Determine, first, whether it was dangerous to go out upon this cover-

ing and then, second, whether it ought not to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises."

That the defendant excepted to the giving of the foregoing instructions and said exception was duly allowed.

WHEREUPON the Court now being willing to preserve the record in order that its ruling may be reviewed for error, if any there be, now certifies that the foregoing bill of exceptions contains all of the evidence offered or admitted on the trial, together with the rulings of the Court and all of the instructions given by the Court, together with all of the instructions requested by the defendant, and also all exhibits.

WHEREUPON, this bill of exceptions is now here settled, certified and signed this 17th day of June, 1916.

CHAS. E. WOLVERTON,
Judge.

Filed July 17, 1916. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,
District of Oregon,—ss.

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing

transcript of record on writ of error in the case in which Ella A. Hutchison is plaintiff and defendant in error, and The Willamette and Columbia River Towing Company is defendant and plaintiff in error, in accordance with the law and the rules of Court, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is $..... for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said district, this ..... day of July, 1916.

Clerk.

No. 2835

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error,

vs.

ELLA A. HUTCHISON,

Defendant in Error.

Brief of Plaintiff in Error.

On Writ of Error to the District Court of the United States for the District of Oregon.

German Publishing Co.

No.----------

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FOR THE NINTH CIRCUIT

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INDEX.

United States Circuit Court of Appeals for the Ninth Circuit.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

Names and Addresses of the Attorneys of Record:

SENN, EKWALL & RECKEN,
Yeon Building, Portland, Oregon,
for the Plaintiff in Error.

FRED OLSEN, Endicott, Washington, and
LANGLEY & LANGLEY,
Board of Trade Building, Portland, Oregon,
for the Defendant in Error.

No.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Defendant in Error is the mother of R. Verne Hutchison. The Plaintiff in Error is an Oregon corporation, and at the time of the matters complained of in the complaint was operating a steamer known as the "J. N. TEAL" out of Lewiston, Idaho. The Celilo Canal had just been opened for navigation purposes, and the steamer "J. N. Teal" made the trip from Portland to Lewiston where a celebration was being held in honor of the opening of the canal. The Commercial Club of Lewiston, Idaho, had asked the

Plaintiff in Error to run excursions out of Lewiston in order to aid in the celebration. These excursions were run at various parts of the day. A charge of twenty-five cents was made by the Plaintiff in Error for each passenger. R. Verne Hutchison, the deceased, belonged to the band, and there was some understanding that a band should accompany each excursion. It appears that the arrangement for the band was made by the Lewiston Commercial Club. On the 3rd day of May, 1915, R. Verne Hutchison together with several of the other band boys from Pullman, Washington, boarded the steamer Teal. He paid no fare, but was supposed to furnish music as one of the band boys. However, on this particular trip the band boys did not bring their instruments, so that the deceased paid neither fare nor was any music furnished by the band. On the date last mentioned it appears that R. Verne Hutchison with the other band boys came aboard the steamer, walked to the back end of the steamer and started to go to the hurricane deck. There were two stairways leading to the hurricane deck, one at the front end of the boat, which was safe, and one at the back end of the boat which Plaintiff in Error also contends was safe. The deceased, together with a number of other boys, instead of ascending the stairway to the hurricane deck at the back end of the boat walked out onto the covering of the wheel and the weight of the deceased together with some other six boys broke the covering, the deceased being precipitated through the wheel into the water below where he lost his life.

The Defendant in Error alleged in her complaint several elements of negligence, as follows:

I.

That there was a failure to provide a safe stairway to the hurricane deck.

II.

That the deceased was not warned of the danger of going upon the covering of the water-wheel.

III.

That an invitation was held out to the deceased to go out on this covering of the water-wheel.

IV.

That the covering was not sufficiently strong for the purpose for which it was allowed to be used.

V.

That deceased was permitted to go out upon the covering.

VI.

That no other stairways were provided.

VII.

That the covering of the water-wheel had deteriorated in strength.

The answer of the Plaintiff in Error denies the negligence complained of by the Defendant in Error

and as an affirmative defense sets up contributory negligence of the deceased, R. Verne Hutchison, in going out upon the covering of the wheel voluntarily and without any orders or directions from Plaintiff in Error.

The reply denies the new matter set up in the answer.

The evidence in this case was to the effect that the deceased together with six or seven other boys, walked out on the covering of the wheel voluntarily and without any orders or directions from anyone. The evidence also showed that this covering of the wheel was not built for the purpose of being used to walk upon. There was no testimony in the case to the effect that anyone had been authorized to walk over this covering. The testimony shows that the deceased could have stayed on the stairway and in this way have been safe from any danger.

On page 46 of the Transcript of Record, the testimony of Mr. Tuttle, a witness called by the Defendant in Error, is as follows:

Q. How many of you boys were on the covering of the wheel at the time it broke through?

A. I should say six or eight.

And on page 47 this same witness when asked whether he could have gone straight up the stairway without going onto the covering of the wheel testified as follows:

Q. Well, now, what was to prevent you from stepping off the plank onto the stairway and going to the hurricane deck?

A. I possibly could have done it.

Q. But instead of that you went out on the wheel covering, six or eight of you?

A. I stepped onto the wheel covering.

Q. And six or eight of the other boys did?

A. I think there were six or eight of them altogether of the passengers.

The testimony of the other witnesses was substantially to the same effect.

Plaintiff in error contends that as it had provided a safe way for the deceased to reach the hurricane deck, one from which no danger could result, it had performed its duty, and if the deceased voluntarily, without orders or directions from anyone, walked out onto the covering of the wheel, that in such case it was not negligent. The jury returned a verdict of $5500.00.

Plaintiff in Error relies upon the following assignments of errors:

I.

Error No. 1.

That the Court erred in permitting the witness Dell Wilson to testify that on a previous trip passengers had gone to the hurricane deck, for the reason

that what may have happened on a previous trip would not be any evidence of negligence.

II.

Error No. 2.

The Court permitted testimony to show that a strong degree of affection existed between the Defendant in Error and the deceased. The Plaintiff in Error contends that this action is based upon the pecuniary loss of the Defendant in Error and nothing can be recovered by loss of society, comfort or affection.

III.

Error No. 3.

Error No. 3 is predicated upon the action by the Court in overruling Plaintiff in Error's motion for a directed verdict, Plaintiff in Error contending that there was no negligence shown and that the evidence as submitted proved that the deceased had been guilty of contributory negligence.

IV.

Error No. 4.

Error No. 4 is predicated upon the Court's refusal to instruct the jury to the effect that there was no obligation on the part of the Plaintiff in Error to keep the covering of the wheel in good condition, provided this covering was not intended to be used as a passageway by the deceased, and provided the covering of the wheel was merely used for the pur-

pose of keeping the wheel from throwing water on the deck of the boat, the Plaintiff in Error contending, and the evidence substantiated this contention, that the covering of the wheel being rounded was intrinsically never intended for a walkaway—that a glance at it would convince any mature person that it was not intended for such use, nor is there any evidence in the record that the Plaintiff in Error authorized its use for passengers to walk upon.

V.

Error No. 5.

Error No. 5 is predicated upon the refusal of the Court to instruct the jury that if there are two ways of reaching a given point, one dangerous and the other safe, it is the duty of the person to pursue the safe way, and that if in this case the Plaintiff in Error had furnished a safe way which the deceased could have used, then it was his duty to use it and that if he pursued a dangerous course he cannot recover, the Plaintiff in Error contending that if the deceased had remained on the stairway which was built and intended for his use, and which he could have used, he would then have avoided all danger, but that instead of this he left the safe passageway and walked into a dangerous place.

VI.

Error No. 6.

Error No. 6 is predicated upon the refusal of the Court to inform the jury that it is not to be swayed

by sympathy or prejudice and that the law in cases of this nature aims at compensation for the pecuniary loss which has been suffered.

VII.

Error No. 7.

Error No. 7 is predicated upon the Court's action in instructing the jury that it was the duty of the Plaintiff in Error to properly officer the boat so as to keep the crowd in the place it ought to be and to prevent the crowd from going to places where it ought not to go or in places that would be dangerous, and that threatened places should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and particularly where the Court informed the jury that it might first consider whether it was dangerous to go upon this covering, and, second, whether it ought to have been protected differently from what it was. There is no claim in the complaint that the boat was not properly officered, nor is there any claim that there should have been barriers or ropes provided.

POINTS AND AUTHORITIES.

ASSIGNMENT OF ERROR NO. 1.

The Court erred in permitting evidence of what happened on a previous trip.

Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202.

Morse v. Minn. & St. Louis Ry. Co., 30 Minn. 465.

Corcoran v. The Village of Peekskill, 108 N. Y. 151.

Terre Haute & Indianapolis R. R. v. Clem, 123 Indiana 15.

Missouri Pacific Ry. v. Hennessey, 75 Texas 155.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in permitting testimony to be introduced in regard to the degree of affection that existed between the deceased and the Defendant in Error.

McFarland v. Oregon Electric Ry. Co., 70 Oregon 27.

13 Cyc. 371.

Wales v. Pacific Electric Motor Co., 130 Calif. 521.

Hillebrand v. Standard Biscuit Co., 139 Calif. 233.

Atchison T. & S. F. R. Co. v. Wilson, 48 Fed. 57.

ASSIGNMENT OF ERROR NO. 3.

That the Court erred in overruling Plaintiff in Error's motion for a directed verdict,

1st: Because there was not sufficient evidence of negligence to be submitted to the jury, and

2nd: The evidence showed that deceased was guilty of contributory negligence.

Radley v. Columbia Railway Co., 44 Oregon 332.

Christenson v. Metropolitan St. Ry. Co., 137 Fed. 708.

Clark's Adm'r. v. Louisville & N. R. Co., 101 Ky. 34.

Benedict v. Minneapolis & St. L. R. Co., 86 Minn. 224.

Burr v. Penn. R. Co., 64 N. J. L. 30.

Conroy v. Chicago, St. P., M. & O. Ry. Co., 96 Wis. 243.

ASSIGNMENT OF ERROR NO. 4.

The Court erred in refusing the following instruction:

"It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering

was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the wheel in good condition, providing this covering of the wheel was not intended to be used as a passageway by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering of the wheel, and your verdict must then be for the defendant company."

St. Louis, I. M. & S. Ry. Co. v. Leftwish, 117 Fed. 127.

Purple v. Union Pac. R. Co., 114 Fed. 123.

Powers v. R. R. Co., 153 Mass. 188.

ASSIGNMENT OF ERROR NO. 5.

The Court erred in refusing the following instruction:

"There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or stairway

from the second to the hurricane deck and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant."

Chicago, St. P. & M. & O. Ry. Co. v. Myers, 80 Fed. 361.

Railroad Co. v. Jones, 95 U. S. 439.

Coleman v. Railroad Co., 114 N. Y. 609.

ASSIGNMENT OF ERROR NO. 6.

The court erred in refusing the following instruction:

"You must first consider whether or not the dedefendant company has been negligent, and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instruction as heretofore given, then that will end your deliberations and your verdict must be for the defendant. If, on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which plaintiff is entitled. In assessing damages you are not to be

guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss, if any, which she will suffer by reason of the death of the deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of deceased."

Wales v. Pacific Electric Motor Co., 130 Calif. 521.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in giving the following instruction:

"Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then you will

determine whether, under the conditions and circumstances, the way was properly protected so that people would not get into danger. Determine, first, whether it was dangerous to go upon this covering and then, second, whether it ought to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises."

Indiana R. R. Co. v. Maurer, 66 N. E. (Ind.) 156.

Fullerton v. Cedar Rapids & M. C. Ry. Co., 101 Iowa 156.

Assignments of Errors are sufficient:

Rule 11, Circuit Court of Appeals.

Tyee Consol. Min. Co. v. Lanstedt, 121 Fed. 709-711.

Moore v. Moore, 121 Fed. 737.

Plain or palpable errors will be considered without assignments.

Shea, et al v. Nilima, et al, 133 Fed. 209.

United States v. Bernays, 158 Fed. 794.

A. Santaella & Co. v. Lange Co., 155 Fed. 724.

N. Y. Life Ins. Co. v. Rankin, 162 Fed. 108.

Baltimore & O. R. R. Co. v. McCune, 174 Fed. 992.

City of Memphis v. St. Louis & S. F. R. Co., 183 Fed. 529.

Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. 125.

Central Imp. Co. v. Cambria Steel Co., 121 Fed. 811.

White v. U. S., 202 Fed. 502.

McBride v. Neal, 214 Fed. 969.

Pittsburgh, C. & St. L. Ry. v. Glinn, 219 Fed. 150.

Pennsylvania Co. v. Sheeley, 221 Fed. 906.

Weems v. U. S., 217 U. S. 362.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 551.

ARGUMENT.

Assignment of Error No. 1 is predicated upon the action of the Court in permitting evidence of what happened on a previous trip. The evidence showed that the "J. N. TEAL" had been running excursions out of Lewiston, Idaho, prior to the one in question. The Court permitted testimony to show what the condition of the boat was on a prior trip, and particularly the condition of the hurricane deck, the number of people that were on the hurricane deck, etc. The question is what was done and what precautions were taken on the trip. What might have been done on a previous trip, or what might have happened on a subsequent trip is immaterial.

In the case of Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 207, Mr. Justice Gray lays down the following rule:

> "Upon this question there has been some difference of opinion in the courts of the several states, but it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent because the taking of such precautions against the future is not to be considered as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant."

In this latter case evidence was admitted to show what was done after the accident. Plaintiff in Error contends that what was done on a previous trip would be just as inadmissable as what occurred on a subsequent trip. The mere fact that the boat might have been overcrowded, or that the Plaintiff in Error was negligent on a previous trip, should not be considered as evidence in determining whether the Plaintiff in Error was negligent upon the trip in question.

Assignment of Error No. 2 is predicated upon the admittance of evidence in regard to the degree of affection that existed between the deceased and the Defendant in Error. The rule appears to be established by the great weight of authorities that the loss of society or affection is not an element of damages. 13th Cyc., page 371, lays down the following rule:

> "LOSS OF SOCIETY.—By the great weight of authorities in an action by parents for the wrongful death of their child, by the husband or wife for the death of his or her spouse, or by the next of kin for the wrongful death of the decedent, damages cannot be recovered for the loss of the society of the deceased."

And in the foot notes Cyc. cites several California cases substantiating this rule, and also cites the case of Holt v. Spokane, etc. R. R. Co., 3 Idaho 703 (s. c. 35 Pac. page 39). We call attention to this citation particularly for the reason that in the case of Anderson v. Great Northern Ry. Co., 15 Idaho 513, the Supreme Court of Idaho sustained the following instruction:

> "In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of intimacy existing between the father and the child, and the loss of companionship, if such be shown, together with what expenses may have been incurred as shown by the evidence, by the father for the funeral and medical expenses."

It will be noticed that this latter case was an action to recover damages for the death of a child four years old. In such an action funeral and medical expenses are elements of damages. Loss of earnings during the minority of the child will also be considered as an element of damages, and it may be claimed with some force that the loss of companionship during the minority of the child is an element of damages.

In the case under consideration the deceased was 24 years old. Judge Ailshie, in deciding the Anderson case, cited as authorities several California cases. Cyc., however, cites the California cases as opposed to the contention of the Idaho Court in the Anderson case.

In the case of Wales v. Pacific Electric Motor Co., 130 Cal. 521, Judge Garoutte reviews the California cases and used the following language:

> "In enlightening the jury as to the measure of damages the court said: 'That is to say, you are to ascertain here what amount, if any, this party contributed to the care and support of the plaintiff here, his mother; not the amount which he earned, as counsel properly stated, but the amount which he contributed to her support and care. And in estimating that amount, as previously stated, you may take into consideration his health, physical ability to labor, and his habits. And in addition to that the law has also said that you may award damages in compensation for the loss of his society.' We have been cited to no case where the law says 'damages may be awarded for the loss of society.' As we read and understand the law, it says directly to the contrary. It is essentially and alone pecuniary loss to the parent which he may recover in damages for the death of his child. In **Pepper v. Southern Pac. Co.**, 105 Cal. 401, the following instruction was declared erroneous: 'That the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages, you may in addition take into con-

sideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death.' In **Lange v. Schoettler,** 115 Cal. 391, it is said: 'It is true in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society and protection of a son or husband, but it has always been held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered.' In **Harrison v. Sutter Street Ry. Co.,** 116 Cal. 156, we find this language: 'While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The instruction here was calculated to lead the jury into the error of supposing that they could on this account add something more than pecuniary loss.' It may well be said in this case that the instruction was calculated to lead the jury in fixing the amount of the verdict to add something more than pecuniary loss. (See also, **Green v. Southern Pac. Co.,** 122 Cal. 563; **Morgan v. Southern Pac. Co.,** 95 Cal. 510). When a jury is told that in making up a verdict it may award damages in compensation for the loss of the society of the deceased, it can only mean what the language so plainly imports, and that is, damages may be awarded for the mere loss of society regardless of any pecuniary loss.''

Assignment of Error No. 3 is predicated upon the action of the court overruling the motion for a di-

rected verdict. The testimony shows that the deceased could have ascended the ladder at the back end of the boat without going upon the covering of the wheel house, and if he had remained on the ladder and ascended it no casualty would have happened. Deceased voluntarily and of his own accord left the stairway or ladder and walked some six or eight feet out on the wheel house. It must have been apparent to the deceased that this wheel house was not intended for the purpose of a walkway. It is rounding in shape; its construction can easily be seen; it is of such a nature that to walk upon it would be obviously dangerous. In this instance the deceased, with six or eight of his companions, walked out on the wheel house, and one of the witnesses of Defendant in Error testified in his deposition that the boys jumped up and down on the wheel house.

The Plaintiff in Error contends that as it had provided a safe way for the deceased to reach the hurricane deck, that he had assumed the additional risk when he left the safe place and went into a place voluntarily of which the Defendant in Error now complains as dangerous.

As was said by the Supreme Court of the State of Wisconsin in the case of Conroy v. Chicago, St. P., M. & O. Ry. Co., 96 Wis., page 250:

> "A carrier owes to its passengers, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains, as well as the duty to seasonably warn him when rea-

sonably necessary, of any existing or apprehended danger which may interfere with or imperil his personal safety. * * * Whether the company had performed its entire duty towards him under the circumstances or not it was his duty to exercise ordinary care and caution to secure his own safety. The railway company was not an insurer of his personal safety, and it is familiar law that under the circumstances stated the duties of the plaintiff and of the defendant to observe proper care and caution are reciprocal. If the plaintiff failed to exercise ordinary care and caution and by reason of such failure he sustained the injuries complained of, he was guilty of contributory negligence and must be held to assume the consequent risk or danger of injury. Assumption of risk in such cases is a species of contributory negligence. * * * It is not a question of what he thought or believed would be safe and prudent under the circumstances for him to do. If he unnecessarily exposed himself to a danger obvious to a person of ordinary care and prudence, and was injured in consequence, he cannot recover. He was an adult and must be held bound to the exercise of the same care and prudence as a person of ordinary care, intelligence and judgment. The defendant, on the other hand, had a right to assume that the plaintiff would act with reasonable care and caution and occupy the position or situation to which he had been directed, and we are unable to perceive anything in the case to warrant the inference that the defendant had any reason to apprehend that the plaintiff would expose himself to or incur unnecessary danger.'

Assignment No. 4 is predicated on the error of the Court in refusing to instruct in substance that if this wheel covering was not intended to be used by the passengers, and this was obvious to a man of mature age, that in such case the deceased assumed the additional risk of going onto it.

As was said by Judge Sanborn in the case of St. L., I. M. & S. Ry. Co. v. Leftwich, 117 Fed., page 128:

> "The platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand-car, or on a freight or baggage car, or in any other place not designated for the carriage of passengers, is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company."

Assignment No. 5 is predicated on the error of the Court in refusing to instruct in substance that where there are two ways of reaching a given point, one dangerous and the other safe, and where the carrier has provided a safe way which is obvious and visible to the passenger, that if the passenger pursues the

unsafe way when the safe way is open to him he is guilty of contributory negligence.

As was said by Judge Thayer, in the case of Chicago, St. P., M. & O. Ry. Co. v. Myers, 80 Fed., page 364:

> "If a passenger of mature age leaves the place which he knows has been provided for him, and without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation made by the carrier, it should be held that he assumes whatever increased risk of injury is incurred by so doing. This doctrine has been enforced in a variety of cases, and in view of the evidence it was applicable to the case at bar."

Assignment of Error No. 6 is predicated upon the error of the Court in refusing to instruct the jury that it was not to be guided by sympathy or prejudice, and that the pecuniary loss which plaintiff had suffered was the measure of damages. This instruction does permit the jury to consider the friendship and affection which existed between the deceased and the plaintiff, but only as an element in ascertaining the pecuniary loss which the mother has suffered. In the place of this instruction the court informed the jury (page 175 of transcript) as follows:

"Now, this case is based for the amount of damages to be assessed, if you should find for the plaintiff, upon the loss of companionship and society. The plaintiff is the mother of the deceased, and that the

relationship that you have to consider and hence you will take into consideration certain matters in determining that. In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of the intimacy existing between the father and the child—in this case the mother and the child—and the loss of companionship and society, if such shall be shown, etc. * * * "

This instruction makes the basis of compensation loss of companionship and society.

As was said by the Supreme Court of California in the case of Wales v. Pacific Electric Motor Co., 130 Cal. 524:

> "When a jury is told that in making up a verdict it may award damages in compensation for the loss of the society of the deceased it can only mean what the language so plainly imports, and that is, damages may be awarded for the mere loss of society regardless of any actual pecuniary loss."

Assignment of Error No. 7 is predicated on the error of the Court in instructing the jury that it was the duty of the Plaintiff in Error to properly officer its boat so that the crowds might be properly handled and to prevent people from going into places that are dangerous; also to see that all gangways, walks and passages which the public were allowed to use should be safe and protected, and that threatened places should be properly guarded by barriers, guard rails and ropes so as to prevent intrusion beyond the limits of the passageway. The complaint

does not claim any negligence in this respect. There was no evidence to show that the boat was not properly officered, or that the passageways were not properly barricaded. This instruction is based upon facts not pleaded nor proved. It would also make the Plaintiff in Error an insurer of the safety of the passengers. It would require the Plaintiff in Error to have officers aboard to prevent passengers of mature age from going into dangerous places, as was said by the Supreme Court of Iowa, in the case of Fullerton v. Cedar Rapids & M. C. Ry. Co., 101 Iowa 156:

> "The Court charged the jury as follows: 'If you find from the evidence that the defendant's employees did not stop the said car which caused the accident as soon as they could do so after discovering that the cows were on the track * * * then you will find for the plaintiff.' The defendant complains of that portion of the charge on the ground that it submitted an issue not presented by the pleadings, and we are of the opinion that the objection is well founded. The petition does not aver, in substance or effect, that the defendant or its employees who were operating the car were negligent in failing to discover the cows, but charges that, with knowledge of their presence on the track, the employees negligently and wilfully ran the car against them."

In regard to the assignment of errors, the record in this case shows that the Petition for Writ of Error was filed May 18, 1916. The Clerk's file marks show that the Assignment of Errors were filed on June 3rd, 1916. There is no question raised as to

the sufficiency of the Assignment of Errors and a perusal of the Assignments will, we believe, show that they are in due form.

Rule 11 of this Court reads as follows:

> "The Plaintiff in Error or Appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

It will be noted from the Assignment of Errors, page 20 of the transcript of record, that the first error relates to the introduction of evidence. The evidence is set out in full as provided by Rule 11.

Assignment No. 2 is also in regard to the admission of evidence and the evidence is set out in full.

Assignment No. 3, alleges error in the overruling of Plaintiff in Error's motion for a directed verdict. This motion sets up the reason why Plaintiff in Error should be entitled to a directed verdict, particularly stating that the deceased took a position voluntarily and without orders or directions from anyone and that this act constituted contributory negligence.

Assignments numbers 4, 5, 6, and 7 pertain to the refusal and giving of instructions. The instructions are set up in totidem verbis, as provided in this rule.

Rule 11 provides that where there is no assignment of error counsel will not be heard except at the request of the Court, that errors not assigned according to this rule will be disregarded, but the Court at its option may notice a plain error not assigned. The assignments in this case are in due form. The Court will notice plain errors though not assigned at all.

In the case of Tyee Consol. Min. Co. v. Langstedt, 121 Federal, pages 709-711, this court speaking through Judge Gilbert, had under consideration a somewhat like situation, and used the following language:

> "A motion is made to dismiss the writ of error upon the ground that no assignment of errors was filed with the clerk of the court below at the time of filing the petition for the writ. The motion is made upon the condition of the record as it appears, showing the file marks of the clerk of the court at Juneau, Alaska. From these indorsements of the clerk it appears that the peti-

tion for the writ was filed on June 23rd, 1902; that the writ was issued on that day, and was filed on July 10th, 1902; and that on the same day the assignment of errors was filed. The case of Frame v. Portland, etc., Co., 47 C. C. A. 664, 108 Fed. 750, is cited in support of the motion. In that case the Circuit Court of Appeals for the Eighth Circuit held it indispensable, under rule 11 (32 C. C. A. cxlvi) that the assignment of errors be filed before the issuance of the writ, to the end that the judge to whom application is made for the writ may be informed of the alleged errors upon which the petitioner relies, in order to decide whether the prayer of the petition shall be granted, and that the opposing counsel, as well as the appellate court, may be informed of the questions of law which are to be raised for consideration. On referring to the transcript in the present case, it will be seen that the assignment of errors bears date June 23rd, 1902, the date of the presentation of the petition, and that in the petition, reference is made to it as 'the assignment of errors filed herewith.' The fair inference from these facts is that the assignment of errors was in fact presented to the trial court, and was lodged with the clerk thereof, at the time when the petition for a writ was filed and that through some oversight of the clerk or misconception of his duty, the file mark was not placed thereon until July 10th. In the absence of a showing to the contrary, the presumption will be indulged that such was the case, and the motion to dismiss will therefore be denied."

And in the case of Moore v. Moore, 121 Federal 737, this Court speaking through Judge Gilbert, uses the following language:

> "A motion is made to dismiss the appeal upon the ground, first, that no assignment of errors was filed in the court below; and, second, that the paper which appears in the record as an assignment of errors does not comply with the requirements of Rule 11 of this Court. An assignment of errors is found in the record, but there is no indorsement of a file mark thereon by the clerk. It begins with the recital, however, that the appellant 'presents this assignment of errors together with his petition for appeal.' The last paragraph of the petition for appeal recites that the appellant 'doth herewith present and file his assignment of errors together with the bond on appeal.' The petition was filed on January 27th, 1902, and on the same date an order was made that the appeal be allowed as prayed for. From these facts it is sufficiently evident that the assignment of errors and the petition for appeal were presented to the court on the same date, and were lodged with the clerk thereof. In the absence of a showing to the contrary it will be presumed that such was the case. The failure of the clerk to indorse the assignment of errors as filed cannot defeat the appellant's appeal. Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088. The assignment specifies as errors the refusal of the court to make certain findings which were tendered by the appellant, error in making the findings which were made, and error in the conclusions of law. We find in it no such defect as to justify

a motion to dismiss the appeal. The motion will be overruled."

In connection with the last case, we refer to page 20 of the transcript of the record in which the Assignment of Errors states, that the Assignment of Errors is made in connection with its petition for Writ of Error in the above entitled action, and alleges the following errors. Thus the assignment under consideration was within the ruling of this Court in the last mentioned case.

There are numerous decisions in other jurisdictions in which the appellate courts have considered plain errors or palpable errors, though such errors were not assigned at all. We beg to call attention to a few of these decisions.

In the case of Shea et al v. Nilima et al, 133 Federal, page 209, this Court speaking through District Judge Hawley, held that the defense of laches may be considered by an appellate Court, though not made the subject of an Assignment of Error.

In the case of United States v. Bernays, 158 Federal, page 794, in the Eighth Circuit Court of Appeals, Circuit Judge Adams used the following language:

"Objection is made to our consideration of this fundamental question because of an insufficient assignment of error, but as it lies at the threshold of the case its consideration, in our opinion, is necessarily involved in the assignment of errors as filed, and even if it were not it seems that a

plain error has been committed which under our rules we may and ought to notice."

In the case of A. Santaella & Co. v. Otto F. Lange Co., 155 Federal, page 724, the Circuit Court of Appeals for the 8th Circuit uses the following language:

> "Rule 11 of this court (150 Fed. xxvii), respecting the assignment of errors, declares that 'the court, at its option, may notice plain errors not assigned.' This proviso was and is intended in the interest of justice to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrates that the suitor has no cause of action. 'Where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying that they can do no more to overcome the evidence the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises before the submission to the jury, and it is the province and duty of the court to determine it.' "

In the case of New York Life Ins. Co. v. Rankin, 162 Federal, page 108, the 8th Circuit Court of Appeals, Circuit Judge Van Devanter uses the following language:

> "Objection is made to our consideration of the question arising upon the admission of evidence of these conversations because error is not separately assigned thereon with the particularity

required by Rule 11 of the rules of this court. Ordinarily, the objection would not be without considerable merit; but as one of the assignments was intended to present the question, and as the rule contemplates that, when justice requires it, we may notice a plain error, though not assigned (see United States v. Tennessee, etc. Co., 176 U. S. 242, 256; 20 Sup. Ct. 270, 44 L. Ed. 452; United States v. Bernays, C.C.A., 158 Fed. 792), we conceive it to be our duty, in view of the circumstances in which the evidence was presented, as before recited, to notice the error in its admission."

In the case of Baltimore & O. R. Co. v. McCune, 174 Fed. 992, the Circuit Court of Appeals for the 3rd Circuit, Circuit Judge Gray, uses the following language:

"But, however, this may be, this court is at liberty to take notice of a plain, palpable error appearing in the record, the correction of which is necessary to the administration of justice between the parties even though the same be not the subject of an assignment by the party aggrieved."

In the case of City of Memphis v. St. Louis & S. F. R. Co., 183 Fed. 529, Circuit Court of Appeals, Sixth Circuit, Sanford, District Judge, the syllabus reads as follows:

"Even when the assignments of error in the Circuit Court of Appeals are insufficient, this does not of itself constitute grounds compelling the dismissal of an appeal, as the court may, nevertheless, under the proviso contained in

> Rule 11 (150 Fed. xvii, 79 C. C. A. xvii) notice a plain error not assigned."

In the case of Chicago, R. I. & P. Ry. Co. v. Barrett et al, 190 Federal 125, Judge Sanford, speaking for the Circuit Court of Appeals for the 6th Circuit, uses the following language:

> "After a careful consideration we are of opinion, however, that as the court did not either specifically refuse or grant this request, but made a finding of facts which is insufficient to support the judgment for the value of the cotton, this error is one of a controlling character of which the court should take notice, although without sufficient assignment of error, under the provision of Rule 11 of this court that even where errors are not properly assigned, 'the court, at its option, may notice a plain error not assigned.' 150 Fed. xxvii, 79 C. C. A. xxvii; City of Memphis v. St. Louis &. S. F. R. Co. (6th Circuit) 183 Fed. 529, 106 C. C. A. 75)."

In the case of Central Improvement Co. et al v. Cambria Steel Co. et al, 201 Fed. page 811, a case decided by the Circuit Court of Appeals for the 8th Circuit, the syllabus, reads as follows:

> "An appeal in a suit in equity in a federal court invokes a trial de novo in the appellate court and under Rule 11 of the Circuit Court of Appeals (193 Fed. vii, 112 C. C. A. vii) a plain error not assigned on such an appeal may be and ought to be considered where the failure to consider it would result in great injustice."

In the case of White v. United States, 202 Fed. page 502, the Circuit Court of Appeals of the 5th

Circuit Court, speaking through District Judge Grubb, uses the following language:

> "It is true the plaintiffs in error do not assign error because of this omission of the court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

In the case of McBride v. Neal, 214 Fed. page 969, the Circuit Court of Appeals for the 7th Circuit, uses the following language:

> "An assignment of errors is the pleading of the party seeking a reversal; and this court is always disposed to disregard any technical questions regarding the form or sufficiency of such a pleading, if it can be deemed sufficient to apprise the adversary of the grounds of reversal that are intended to be presented to the court; and we are also always disposed to note a substantial error which has entered into the judgment whether it has been properly assigned or not, and even if there is no assignment."

In the case of Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, 219 Federal 150, Circuit Judge Dennison states that in the 6th Circuit the rules provide that the assignments of error shall be filed at the time of settling the bill of exceptions. Yet, notwithstanding this fact, Judge Dennison uses the following language:

"The assignments of error were belated, not having been filed at the time of settling the bill of exceptions, and they might well be disregarded, under Rule 10 (150 Fed. xxvii, 79 C. C. A. xxvii); but this was a new and probably unfamiliar rule at the time the bill of exceptions was settled, and we have thought proper to look into the assignments."

In the case of Pennsylvania Co. v. Sheeley, 221 Fed. page 906, Judge Dennison speaking for the Circuit Court of Appeals for the 6th Circuit, uses the following language:

"However, there is one matter which must be considered, 'plain error' so that it is our duty, under Rule 11 to notice it without sufficient exception or assignment. The case was tried some months before the Supreme Court in Norfolk Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914, C. 172, had formulated the rule of damages in cases of contributory negligence and while the rule, as given by the court below to the jury, was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the Supreme Court has said it is, and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore be another trial, unless this error can be cured by a remittitur."

It will be noticed that in this last case Judge Dennison states that an erroneous instruction as to the amount of damages which may be recovered in a personal injury case is a plain error, which the Court may consider without any assignment. One of the assignments of errors in the case under consideration is as to the element of damages.

In the case of Weems v. United States, 217 U. S. page 362, Mr. Justice McKenna construes Rule 35 of the Supreme Court of the United States. This rule is identical in wording with Rule 11 of the Circuit Court of Appeals as will be noticed from the foot note at the bottom of page 358 of Volume 217. Mr. Justice McKenna in speaking of this rule uses the following language:

> "It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under Rule 35 which provides that this court, 'at its option may notice a plain error not assigned.'
>
> "It is objected on the other side that Paraiso v. United States, 207 U. S. 368 stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in Paraiso v. United States, but we exercised it in Wiborg v. United States, 163 U. S. 632, 658; Clyatt v. United States, 197 U. S. 207, 221, and Crawford v. United States, 212 U. S. 183. It may be said, however, that Paraiso v. United States is more directly ap-

plicable as it was concerned with the same kind of a crime as that in the case at bar and that it was contended there as here that the amount of fine and imprisonment imposed inflicted a cruel and unusual punishment. It may be that we were not sufficiently impressed with the importance of those contentions or saw in the circumstances of the case no reason to exercise our right of review under Rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights. And such rights are asserted in this case."

And again in the case of Columbia Heights Realty Co. v. Rudolph, 217 U. S. page 551, Mr. Justice Lurton uses the following language:

"Sections 997 and 1012, Rev. Stat., require the transcript from the Circuit Court to be filed with an assignment of errors, and the thirty-fifth rule of this court prescribed the character of such assignments, and 'that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed * * * and that 'errors not assigned according to this rule will be disregarded, but the court, at its option may notice a plain error not assigned.' This rule refers in terms only to writs of error and appeals under Sec. 5 of the Act of March 3rd, 1891, but

it is, in effect extended to every writ of error or appeal to or from any court by Rule 21, which requires that the brief shall set out 'a specification of the errors involved.' This specification of error, must conform to Rule 35 in particularity. Thus the fourth paragraph of Rule 21, provides: 'When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified, according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.'

"The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal because of the non-assignment of errors as required by Sections 997 and 1012, Rev. Stat., having by its rules, reserved the option to notice a plain error whether assigned or not. Ackley School District v. Hall, 106 U. S. 428; Farrar v. Churchill, 135 U. S. 609, 614; United States v. Pena, 175 U. S. 500, 502.

"In the present case the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objection for failure to assign error under Section 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any 'plain error' which obviously demands correction.

We respectfully submit that the errors aforesaid entitle Plaintiff in Error to a judgment of reversal.

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No. 2835

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, A CORPORATION

Plaintiff in Error

VS.

ELLA A. HUTCHISON

Defendant in Error

Brief of Defendant in Error

On Writ of Error to the District Court of the United States for the District of Oregon.

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SCHWAB PRINTING COMPANY

No. 2835

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, A CORPORATION
Plaintiff in Error

VS.

ELLA A. HUTCHISON
Defendant in Error

Brief of Defendant in Error

On Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT.

On May 3, 1915, plaintiff in error was operating as a common carrier, a steamboat in the Snake River at Lewiston, Idaho, said boat being known as the "J. N. Teal." Mr. R. Verne Hutchison, a youth twenty-four years of age, as a member of a band, boarded said boat while the same was at the wharf, and passed to the stern of said boat for the purpose of ascending to the upper deck.

For the purpose of using certain permanent stairs, *landing on covering of water-wheel,* generally used as a means of ascent and descent between the two decks, it became necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer. While attempting to ascend stairs, the covering of the water-wheel broke, letting R. Verne Hutchison fall through said water-wheel into the water of Snake River, and said R. Verne Hutchison was thereby drowned.

Action was brought by the widow mother, as sole heir at law under the statute of the State of Idaho, same being based on Revised Codes of Idaho, Section 4100.

The mother made the following allegations of negligence:

"That defendant was careless, reckless and negligent in the manner following:

(a) That defendant failed to provide a safe landing of stairs from the first to second decks.

(b) That defendant failed to warn decedent not to use said stairs, or not to go upon the covering of said water-wheel.

(c) That by reason of the lack of warning or guards, and the presence of the stairs, with a board leading from the railing of the lower deck to the base of landing of said stairs on said water-wheel, defendant thereby held out an invitation to decedent to go upon the covering of the water-wheel and use said stairs.

(d) That the covering of said water-wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used.

(e) That defendant allowed or permitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

(f) That no other stairs leading from first to second decks was provided on said boat.

(g) That the covering of said water-wheel had been allowed to deteriorate in strength."

The jury saw the boat, and were aided by pictures. The defense was contributory negligence, in which it was claimed:

That Mr. Hutchison disregarded posted notices, and the verbal warnings of an employe of the boat, named Mohler. That in his attempt to reach the hurricane deck, he stepped off the plank that led from the top of the deck railing of the lower deck, to the base of the stairs. (This plank rested on top of wheel covering. The stairs lead from, and rested on the wheel covering.) That an iron *ladder* could have been used with safety. (This was a fixture of the boat, on the far side from where Mr. Hutchison boarded the boat.) That there was commotion among the passengers and members of the band while they were on the covering of the water-wheel.

Defendant in error called twelve witnesses, who had either used the stairs within the day, or been to the place where the plank led out to the covering of wheel and to the base of the stairs. *These witnesses*

all testified that they saw no notices. A picture introduced by defendant in error to show the stairs and plank, *which was taken a few days after the occurrence,* showed what is probably a tin notice of some kind posted directly above the plank. Witnesses, not noticing the dark spot above the plank in the picture, identified the picture as being a correct reproduction of the physical conditions at the time of the drowning of Mr. Hutchison. Overlooking that the picture was taken a day or two after the occurrence, and that the witnesses' attention was not called to the dark spot, which is probably a notice, counsel contended, that this established the position of the boat company that there was a notice. Four of the twelve witnesses, three of whom were ladies, one of these, sixty-one years of age, had just used the stairs, and were on the upper deck at the time of the drowning of Mr. Hutchison. *Although the boat company called seven witnesses that worked on the boat, but one, Mr. Mohler, testified there were notices.*

Mr. Riggs, master and pilot, was asked by the court (Transcript, page 149): "Then it was usual to allow passengers to go up that way to get on the hurricane deck?" to which the witness replied, "When I seen fit, yes. When I seen fit, and things were roped off proper for passengers, could let as many as I seen fit."

The roping off, as admitted by witness, was on the upper deck, to protect passengers on the upper deck, and had nothing to do with guarding the stairs,

or protecting the passengers on the covering of the water-wheel. By this, the boat company admitted that the practice was to use the stairs in the condition same were then in.

As to Mr. Mohler giving verbal notice not to use the stairs, he testified that he was on the hurricane deck at the head of the stairs, warning passengers not to come to the hurricane deck. The circumstances of his claiming to be on top, rather than at the place where the passengers were coming on the cover of the water-wheel, condemns the story. As the purpose was to prevent injury, certainly any one's intelligence would direct that he be at the place where the passengers were coming on the covering of the water-wheel. Doubtless the object of Mr. Mohler's testifying that he was on the hurricane deck, was to place himself in a position where there would be few passengers to refute his story, as the boat was just loading, and only a limited number of passengers had reached the upper or hurricane deck.

About four witnesses had just used the stairs, some three or four of passengers were going up, and others on the water-wheel could see on top of the hurricane deck. None of these passengers saw Mr. Mohler. The reason for Mr. Hutchison's stepping off the plank, was that other passengers were coming on behind him, and several were on the stairs going to the hurricane deck. (The only other means of reaching the hurricane deck was by an *iron*

ladder, which led from the *far side of the boat from that on which the passengers were boarding.*)

The persons with Mr. Hutchison had seen the members of another band than that of which Mr. Hutchison was a member, come down the stairs over the water-wheel when the boat came in from a previous trip from which the boat had just returned. It is in evidence that his band was told to go to the upper deck.

As to the commotion, our witnesses testified there was none. Some of defendant's witnesses testified there was commotion *coming on the boat.* The defendant attempted to make something of the fact that a young man by the name of Bostock testified he jumped on the covering of the water-wheel (page 109 of Transcript). *This young man was on a previous trip of the boat, and was not with the party of which Mr. Hutchison was a member. Neither was he an acquaintance of Mr. Hutchison or a member of his band.* An attempt is made in opponent's brief (at page 21), to have it appear by implication that this young man was of the party. To the contrary, see Transcript, page 106. At the bottom of page 2 of Plaintiff's Brief, the statement is made that decedent walked out on the wheel-house. Again at page 21, the statement appears that decedent walked away from stairs "some six or eight feet." *At page 66, Transcript, witness states Mr. Hutchison stood beside him, and he stood but four feet from the base of stairs.* (This is only testimony on the subject.)

At page 4 of brief, plaintiff recites Mr. Tuttle's testimony in which he states, possibly he could have stepped directly from plank to stairs. Mr. Tuttle as well as all the other witnesses testified that the reason they did not ascend the stairs was due to the presence of other passengers on the stairs, some of whom were ladies. They also stepped aside to allow ladies to ascend who were behind. (See Transcript, pp. 49, 61, 70, 79.)

POINTS AND AUTHORITIES.

The writ should be dismissed, as the petition was filed, and the writ issued, May 18, 1916, while the assignment of errors was not filed or served until June 3, 1916.

Rule 11, U. S. Appellate Court.
Fosters Fed. Practice, Vol. 3, p. 2469.
Frame v. Portland Coal Co., 108 Fed. 750.
Weber v. Nihills, 124 Fed. 64.
Simpson v. First National Bank, 129 Fed. 257.
Copper River Co. v. McClellan, 138 Fed. 333.
Coyote G. & S. M. Co. v. Ruble, 9 Ore. 121.

Sec. 4099 of Statutes of Idaho, reads as follows:

"A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person

be employed by another person, who is responsible for his conduct, also against such other person."

Sec. 4100 of Statutes of Idaho, is as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

Every exception taken is too general to entitle plaintiff in error to review.

Rule 40, District Court of the United States, District of Oregon.

ASSIGNMENT No. 1.

The evidence excepted to was admissible for four reasons:

(1) To show the custom of the boat company in allowing the stairs to be used, and allowing passengers on the upper deck, both alleged facts of which were in issue.

(2) The boat company contended that there were notices warning passengers not to use the stairs, and not to go to the hurricane deck. Assuming that there were notices, this evidence would be

admissible to show the disregard of the same by the boat company.

(3) To show that the boat company must have had notice that passengers were using the stairs in question, and riding on the hurricane deck.

(4) The evidence would be admissible for the purpose of informing the jury whether or not Mr. Hutchison could be considered guilty of contributory negligence in using the stairs.

29 Cyc. 607, 612, 639.

Ill. Central Railroad v. Davidson, 76 Fed. 517-520.

Chicago G. W. R. Co. v. Egan, 159 Fed. 40.

Crawford v. Stock Yard Co., 215 Mo. 394.

Galvin v. Brown & McCabe, 53 Ore. 598-614.

ASSIGNMENT No. 2.

The evidence complained of was admissible to establish the intimacy between mother and son, as of the measure of damage under the *Idaho Statute.*

Sec. 4100, Idaho Statute.

Anderson v. Great Northern R. R. (Idaho), 99 Pac. 91-92.

Shearman & Redfield on Negligence, (6th Ed.), Sec. 767.

ASSIGNMENT No. 3.

The question of contributory negligence cannot be reviewed, as the evidence is not before the court.

Same is not certified, or in any way authenticated by reporter taking same.

ASSIGNMENT No. 4.

An instruction should not assume the existence of a material fact in dispute.

38 Cyc. 1657.

ASSIGNMENT No. 5.

Public carriers must keep entire premises safe.

3 Thompson's Com. on Negligence, Sec. 3060.

ASSIGNMENT No. 6.

The court gave the instruction asked for.

Pages 175-176, Transcript.

Anderson v. G. N. Co., 99 Pac. 91.

ASSIGNMENT No. 7.

The error complained of, if it be error, was fully cured by other instructions.

ARGUMENT.

The writ should be dismissed in this case, as the petition was filed, and writ issued May 18, 1916, while the assignment of errors was not filed or served until June 3, 1916. The authorities that we have cited under "Points and Authorities," are decisive of our right to have the writ dismissed.

The only authorities cited *by opposing counsel* that are in cases where it was contended no assign-

ments were filed with petition, are the following:

Tyee Consolidated Mining Co. v. Langstedt, 121 Fed. 709-711.

More v. More, 121 Fed. 737.

Pittsburg C. C. & St. L. Ry. v. Glinn, 219 Fed. 150.

The first case cited by plaintiff, is a case in which the court found *the circumstances indicated the assignments of error had been filed with the petition,* although the assignments had a filing mark of a subsequent date. In the second case, *the assignments had not been filed, the instrument was found in the files, and the petition recited the presentation of assignments with the petition.* The court held that it would be presumed the assignments were filed with the petition.

Both of these cases are authorities to sustain our motion. Had the record shown the assignment of errors filed subsequent to petition, decisions clearly indicate the holding would have been to the contrary, and the writ dismissed. In the third case, the question that appears to have been before the court was whether or not the assignments of error were filed in time, where the same had been filed after the *bill of exceptions,* and Rule 10 of the *Sixth Circuit Court of Appeals was under consideration.* We are unable to examine Rule 10 of the court which had this matter under consideration. It would appear that Rule 10 of that court might not be the same as Rule 11 of this court.

No reference is made in this decision to the terms of a rule, such as Rule 11, which provides that the assignments shall be filed with the petition, *and that otherwise, the petition shall not be allowed.* All the other cases cited by plaintiff have to do with the question of noticing additional, faulty or unassigned errors *rather* than the question of a writ being allowed where *no* assignments of error are filed with the petition.

Rule 11 of this court says: *"No writ of error or appeal shall be allowed until such assignments of error shall have been filed."*

This fully disposes of the question of allowing writs of error. Following this language, as found in the rule, are instructions as to how the assignments are to be made. Then follows the language: "When this is not done, counsel shall not be heard, except at the request of the court, and errors not assigned according to this rule, will be disregarded, but the court, at its option, may notice a plain error not assigned."

Certainly this language as last used, does not mean to render nugatory the provision that *"no writ shall issue until assignments are filed."*

It means what the numberless decisions last cited by opposing counsel hold, that plain error not assigned may be noticed. In short, the court is without authority to issue writ unless *some assignments have been filed with petition.*

Hence, the court must dismiss, rather than make an examination. This court cannot find plain error

without an examination of the record. When an error is found, it becomes *plain error.* If plaintiff is entitled to an examination of record on a writ that should not issue, then why file assignments at all? The purpose of this rule is so plain as to leave no doubt as to its meaning. There must be some assignments of error before the court can say plaintiff is entitled to the writ. Otherwise, a writ could and would issue in a case where no objections were made, or exceptions taken, and there was nothing on which to predicate alleged error. What a meaningless proceeding suing out a writ is, if there is no alleged error on which to base the writ? When an assignment has been made, and the court is engaged in examining the alleged error, then it is but reasonable that error not properly assigned, as provided in Rule 11, but properly preserved in the trial, might be noticed.

It is claimed that plaintiff is within the rule, under the first two decisions, as it is recited in the assignment that assignments "are in connection with its petition." This in no way aids plaintiff in error, as nothing can be assumed from this to establish by implication that the assignments were filed with the petition, or to impair the verity of the filing endorsements. Plaintiff cannot contend, nor does it pretend to say, that there is any mistake in dates of filing. The admissions of service are of dates of filing.

We have cited *Coyote G. & S. M. Co. v. Ruble,* 9 Ore. 121, to the effect that the court is bound equally with the litigating parties as to rules of the court;

that where no discretion is reserved by the court under the rule, the rule is binding on the court. This case is a leading case on this question, and has been followed in a long line of decisions by the Supreme Court of the State of Oregon, and by other Supreme Courts. If the court should refuse to dismiss writ, then we submit the court must only look for *plain error.*

In our opinion, there is no rule of practice that serves a more laudable purpose, and should be more rigidly enforced, than the rule requiring objections and exceptions to be specific. Otherwise, an undue advantage is taken of the prevailing party. Many times courts are inclined to overlook this rule, to the great disadvantage and injury of the prevailing party.

In the record of this case, the second exception is the only one that informs the trial court, or defendant in error, of the alleged error. All other assignments are made known for the first time in our opponent's brief. So far as serving the purpose that objections and exceptions are expected to serve, plaintiff in error may as well have taken one exception to the whole proceeding.

The admission or exclusion of evidence is not measured by its competency, but by its incompetency. It is necessary that the grounds of alleged incompetency be specific to preserve the right of a review.

In saving exceptions to instructions refused, to

serve the purpose for which the rule exists, that particular error complained of, must be brought specifically to the attention of the court. We submit that our opponent now seeks to have this case tried *de novo.*

In discussing the several assignments of error, we will not again make reference to the insufficiency of opponent's objections and exceptions. In considering any assignments, we respectfully invite the court's attention to the insufficiency of the objections and exceptions.

ASSIGNMENT No. 1.

This assignment is based on the objection to the testimony of Dell Wilson, who testified that he, together with his wife and child, used the stairs on the previous trip of the boat, made the same day as the trip about to be started when Mr. Hutchison was drowned. He further testified that he at this time saw passengers on the hurricane deck. *This evidence was not introduced to show other acts of negligence, nor was it claimed to serve this purpose.*

Under "Points and Authorities" we have shown that this evidence was admissible for four reasons. No request was made by opponent to limit the effect of the testimony. If opponent thought that this evidence might be taken by the jury as establishing other acts of negligence, it was its duty to ask that this testimony be limited to the purpose for which it was competent. All through opponent's brief, it is insisted passengers were not allowed, or expected to use the stairs; that notices and a

guard forbade the use; that another way of going to the hurricane deck was the way Mr. Hutchison should have gone. On this occasion the boat was just receiving the passengers. By what other character of evidence could the custom and practice of allowing passengers to use the stairs in question be established, or the charge be established, that if notices were posted, that the same were being disregarded; that the boat company must have had notice of the fact that the stairs were being used by the passengers; that Mr. Hutchison was justified in the use of the stairs.

ASSIGNMENT No. 2.

The evidence complained of, was admissible to establish the intimacy between mother and son, as of the measure of damages under the Idaho statute. Counsel appears to concede that society, comfort and companionship are elements of damage under the Idaho statute, but complains that the pecuniary value must control the amount to be given. The objection can in no way affect our right to show the intimacy. In the instruction requested by the boat company, which it claims was refused, and that the refusal was error, it states that *friendship and affection* are to be taken into consideration in compensating the plaintiff for the pecuniary *or money loss.*

At page 176 of the Transcript of Record, the court will find that the trial court made use of the words *"money value"* twice, in giving the instruction as to the measure of damage. In one of the cases

cited by opponents, namely, *Hillebrand v. Standard Biscuit Co.,* 139 Cal. 233, the court uses the following language:

> "The pecuniary loss, in such cases, means the *value in money,* if any, of the life of the deceased."

Hence, the value in money is the pecuniary loss. The words "pecuniary" and "value in money" are synonymous. In any event, an examination of the requested instruction, will indicate that the boat company was asking for an instruction for pecuniary loss, or *money loss.* The instruction asked for was given. It would indeed be a strange anomaly that error could be committed in the admission of evidence, when the party charging error claims error was committed on alleged refusal of an instruction setting forth the subject as an element of the damage. Much of the argument under this assignment is applicable to assignment 6, in which it is charged that a proper instruction as to the measure of damage was refused. The argument made here will not be reiterated in the argument of assignment No. 6. We invite the application of the argument under this assignment to be taken into consideration in considering assignment No. 6.

ASSIGNMENT No. 3.

The question of directed verdict cannot be reviewed. The purported evidence, as found in the transcript, is in no way authenticated. There is no certificate of the reporter. Nothing is found in the

transcript to indicate where the same came from. However, waiving this, the best argument that there is evidence of negligence, and none of contributory negligence, is the verdict of twelve jurymen. In the argument of this assignment, opposing counsel seeks to have it implied that a member of the party jumped on the covering. The young man whose deposition stated that he had jumped on the covering, was on a previous trip of the boat, was not a member of the band of which Mr. Hutchison was a member, was not with the party at the time of Mr. Hutchison's drowning, nor was he even an acquaintance of Mr. Hutchison.

We are not going to take space or time to discuss the evidence. We have made quite a complete statement of the case, and indicate in the statement what the evidence shows. If the court has not read the statement, we respectfully ask that the court read the statement in connection with this assignment, as the statement of opposing counsel is misleading in several particulars.

The statement has been made by opposing counsel, that the *stairs* expected to be used were at the *front part* of the boat. There is no justification for such a statement, as there are no stairs at any place on the boat leading to the hurricane deck, other than the stairs attempted to be used by Mr. Hutchison. The only other means of reaching the hurricane deck is by an iron ladder, which is on the far side of the boat from the side boarded by Mr. Hutchison and his party. This iron ladder cannot be seen from the

side of the boat boarded by Mr. Hutchison. The evidence all went to indicate that no member of the party knew of the iron ladder. They had seen another band descend by the stairs leading onto the covering of the water-wheel. As there were several passengers both ahead and behind Mr. Hutchison, several of whom were ladies, Mr. Hutchison stepped aside a short distance from the base of the stairs, when he broke through the covering of the water-wheel.

Opposing counsel has attempted to have it appear that Mr. Hutchison could have remained on the plank, turned abruptly at right angles, and ascended the stairs, thus avoiding any necessity of his stepping on the covering of the water-wheel. The jury saw the boat, and observed the physical condition. Evidently the jury believed that Mr. Hutchison was not guilty of contributory negligence in not doing as opposing counsel would now have had him do.

Assignment No. 4.

The instruction asked for, excludes from the consideration of the jury, a question of fact in issue, namely, whether or not the defendant was allowing the passengers to use the covering of the water-wheel in reaching the hurricane deck. The requested instruction would determine the liability of the boat company by what the constructor of the boat may have *intended* the covering to be used for. The court has no right to assume, as is assumed in this instruction, that it would not be necessary, convenient,

practicable or probable that the covering of the water-wheel would be used in connection with the stairs, nor has the court the right to exclude from the consideration of the jury, the fact that the water-wheel covering was not guarded, or made sufficiently strong, and kept so, to serve the purpose for which the boat company was allowing same to be used, when the circumstances might indicate a reason to anticipate the use to which the covering of the water-wheel was or might be placed.

ASSIGNMENT No. 5.

Under this assignment, we have cited authorities to the effect that public carriers must keep their entire premises safe. We feel that this is a rule so well established, and so applicable to the assignment, that no argument is necessary.

ASSIGNMENT No. 6.

In this requested instruction, defendant has made request for an instruction defining the measure of damages, which is in keeping with the evidence introduced by the plaintiff, on which plaintiff in error based assignment No. 2. Here is an alleged error, based on a requested instruction claimed to be refused, when it will be found at page 175 and 176, Transcript of Record, that the requested instruction was covered almost word for word.

Granting for the purpose of argument, that there may be a distinction, we desire to call the court's attention to the fact that there is no exception made to the instruction as given.

We are not going to be drawn into a lengthy argument as to the measure of damages. The case of *Anderson v. Great Northern Ry. Co.,* (Idaho), 99 Pac. 91, sustains a very much broader rule as to the measure of damages, than was given by the trial court in the case at bar.

We are not concerned with what the rule may be in other jurisdictions. We submit that the instruction given by the trial court is more favorable to the boat company, than the instruction sustained by the Supreme Court of Idaho. As we understand the rule, the federal courts are expected to follow the law of the state where the tort was committed.

In opponent's brief, it is contended that the Anderson case is a recovery for a minor; that the same rule would not apply to a recovery of a beneficiary for the death of an adult. Section 4099, Revised Statutes of Idaho, provides who may bring the action in behalf of the minor, and Sec. 4100, who may bring the action in behalf of the adult, *then providing that in either case, such damages shall be awarded as to the jury may appear to be just under all of the circumstances.* (See Points and Authorities.) We are unable to understand how there can be any distinction in so far as the loss of comfort, companionship, and society are concerned, as between minors and adults.

ASSIGNMENT No. 7.

Perhaps no other assignment so exemplifies the charge that we have made, that the exceptions were

not specific, than this assignment. We feel confident the trial court had no idea on what this exception was being based. We know that we had no idea until we received opponent's brief. It now appears that it is claimed that the language used by the court in giving this instruction, allowed another ground of recovery than that alleged in our complaint.

At page 166, Transcript of Record, the court will find that the complaint was read to the jury, and they were instructed that the recovery must be had on the charges of negligence contained in the complaint. This would cure any error, if there were error in the instruction complained of. However, there was no error in the instruction complained of.

Very adroitly, opposing counsel has stated some of the allegations of plaintiff's complaint, but has omitted certain charges which make the instruction entirely proper. Opposing counsel, in stating the charges of negligence, has failed to indicate that there were charges of negligence covering the following:

That there was a failure to provide a safe landing of stairs from first to second decks. That by reason of the lack of warnings or guards, and the presence of stairs, with a board leading from railing of the lower deck to base of landing of stairs on said wheel-house, there was an invitation to decedent to go upon the covering of the water-wheel, and use said stairs. That defendant allowed or per-

mitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

These allegations, in addition to the allegations set out by opposing counsel, clearly inform the boat company that we allege there were not sufficient guards or warnings. Whether the guarding be done by properly officering the boat, roping the place, or by other means, or the warning be given by officers, is quite immaterial in so far as the charge of negligence is concerned. The reference that the court has made to guards could not have been misunderstood by the jury. The guards referred to employes being provided that would give proper warnings and instruction to the passengers, or by roping the place to protect the passengers.

Generally speaking, any employe entrusted with this duty, would be an officer of the boat, and in speaking of the boat not being properly officered, the court was conveying to the jurors, the obligation of the boat to see that warnings and instructions were given where the jury might consider warnings necessary or proper.

The allegation that a safe landing for stairs was not provided, is sufficient to charge boat company with every character of omission or commission. Particularly is this true after verdict.

If any of the instructions are correct, then the court must sustain the whole under the objection, exception and assignment.

In charging no evidence was introduced to cover these charges, it must be counsel refers to expert

testimony or conclusions, as the evidence is before the jury of the conditions surrounding the place, and of the happening. This was not a proper matter for expert testimony. What would be necessary to make the place safe are matters of common knowledge. When the circumstances are before the jury, under the allegations, it must be for them to say whether guarding and warning was necessary, and if so, how, where and when it should have been done.

We respectfully submit the judgment should be affirmed.

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Attorneys for Defendant in Error.

No. 2836

United States

Circuit Court of Appeals

For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2075.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Now comes the United States of America, by Francis A. Garrecht, United States Attorney for the

*Page-number appearing at foot of page of original certified Record.

Eastern District of Washington, and brings this action on behalf of the United States against the Great Northern Railway Company, a corporation organized and doing business under the laws of the State of Minnesota, and having an office and place of business at Merritt, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 9, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918; said train being run over a part of a through highway of interstate commerce, and being then [2] and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdic-

tion of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Acts of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 11, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1900; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said de-

fendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within [3] the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 13, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1910; said train being

run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of [4] said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903

(contained in 32 Statutes at Large, page 943), said defendant, on July 14, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1917; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended. [5]

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

FOR A FIFTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at

Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 15, 1914 ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to the plaintiff in the sum of one hundred dollars. [6]

FOR A SIXTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 16, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1911; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress as amended, defendant is liable to the plaintiff in the sum of one hundred dollars.

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the

times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington. [7]

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 17, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1907; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, de-

fendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), [8] and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 18, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1912; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train; and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1

of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A NINTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 18, 1914, ran on its line of railroad its certain freight train, known as Extra East, drawn by its own locomotive engine No. 1904, said train being [9] run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed

of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Acts of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 20, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1921; said train being run over a part of a through highway of interstate commerce, and being then and their engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid overs its line of railroad from Cascade [10] Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake

for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN ELEVENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 21, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1904; said train being run over a part of a through highway of interstate commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of

railroad from Cascade Tunnel, in the State of Washington, to Merritt in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common [11] hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TWELFTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on July 22, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1901; said train being run over a part of a through highway of interstate

commerce, and being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakeman using the common hand-brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand-brake to control the speed of said train, and when the speed of said train was not controlled by the power or train-brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid Act of March 2, 1893, as **[12]** amended.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of twelve hundred dollars and its costs herein expended.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Complaint. Filed December 18, 1914. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[13]**

[Title of Court and Cause.]

Answer.

Now comes the above-named defendant, Great Northern Railway Company, and for its answer to the complaint of the plaintiff herein, and to each and every cause of action therein set forth:

I.

Said defendant admits that this action was brought on behalf of the United States against this defendant, and that this defendant is a corporation, organized and doing business under the laws of the State of Minnesota, and that it has, and did have during all the times mentioned in the complaint herein, an office and place of business at Merritt in the State of Washington. Said defendant admits that this action has been brought by the United States of America, through Francis A. Garrecht, United States Attorney for the Eastern District of Washington, upon the suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, upon information furnished by said Commission.

II.

Said defendant further admits that it is, and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by railroad in the State of Washington, and that on the dates, at the times, and by the engines therein named, it ran upon its line of railroad freight trains mentioned in said complaint, and that each and all of said trains were run over a part of the through

highway of interstate commerce, and were then [29] and there engaged in the movement of interstate traffic, and that said defendant ran said trains from Cascade Tunnel to Merritt, both in the State of Washington, and within the jurisdiction of the court herein.

III.

Said defendant further alleges that each engine upon each of said trains was equipped with power-driving wheel brake and appliances for operating a train-brake system, and that in each train not less than eighty-five per cent of the cars therein were equipped with power or train-brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand-brakes.

IV.

Said defendant specifically denies that the Act of Congress mentioned in the complaint herein as amended, was violated by the said defendant, and denies that the said defendant is liable to the said plaintiff, either in the sum of one hundred dollars on each and every cause of action set forth in said complaint, or in any sum.

WHEREFORE, said defendant prays judgment that plaintiff take nothing by its action, and that said defendant be dismissed and discharged from the said premises and said complaint, as specified.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

State of Washington,
County of Spokane.

Charles S. Albert, being duly sworn, on oath says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the above-entitled cause, that he has read the foregoing [30] answer, knows the contents thereof, and he believes the same to be true.

That defendant is a foreign corporation, is not within said county, is incapable of making the affidavit of verification herein, is absent from said county, and has no officer within the same authorized to make the verification, other than its attorneys, one of whom is affiant, who is duly authorized so to do and that the reason for this affiant making this verification is hereinbefore immediately set forth.

(Signed) CHARLES S. ALBERT.

Subscribed and sworn to before me this 12th day of May, 1916.

(Signed) HERBERT H. SIELER,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[Endorsements]: Answer. Due service of the within answer by a true copy thereof is hereby admitted at Spokane, Washington, this 13th day of May, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 1, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [31]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, That on the 19th day of July, 1916, the above-entitled cause come on for trial before the above-entitled court, upon plaintiff's motion for judgment upon the pleadings, and the cause having been submitted to the above-entitled court for final decision and judgment upon the pleadings:

Honorable Frank H. Rudkin presided over said court. The plaintiff appeared by Francis A. Garrecht, its counsel, and defendant appeared by Charles S. Albert and Thomas Balmer, its counsel, and the following proceedings were had: Plaintiff made a motion for judgment upon the pleadings in words as follows: (Title of Court and Cause.)

Motion for Judgment upon Pleading.

MOTION.

"Comes now the plaintiff, by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and moves the Court that judgment be entered herein in favor of the plaintiff upon the pleadings in said action.

Dated this 19th day of July, A. D. 1916.

FRANCIS A. GARRECHT,
United States Attorney."

Whereupon the defendant objected to the granting of said motion in words as follows: (Title of Court and Cause.)

OBJECTIONS TO GRANTING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS.

"Now comes the above-named defendant, Great Northern Railway [37] Company, and objects to the granting of the motion of the plaintiff to grant judgment herein in favor of the plaintiff and against the defendant on each and every cause of action herein, upon the following grounds:

I.

That no cause of action in favor of the plaintiff and against the defendant has been proven or is shown by the pleadings.

II.

That no cause of action against the defendant has been proven or shown by the pleadings under the Acts of Congress known as The Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an act approved March 2, 1902 (contained in 32 Statutes at Large, page 943), which act is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in Interstate Commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," nor under the order of the Interstate Commerce Commission promulgated June 6, 1910, in the matter of the standard heighth of the minimum percentage of power brakes.

III.

That it is shown that the defendant has fully equipped its locomotives and cars as required by said statutes and said order and that said statutes and said order do not prohibit the use of hand-brakes for the purpose of controlling the speed of said trains.

IV.

That the complaint herein does not charge a violation of said Acts or of said order, nor does it charge that a sufficient number of cars in the train were not equipped with power or train-brakes to enable the engineers, on the locomotives drawing said [38] train, to control their speed without requiring brakemen to use the hand-brakes for that purpose, nor does said complaint charge a failure to comply with the requirements of said acts or said order of the Interstate Commerce Commission.

V.

That it appears from the pleadings herein that the trains in question were properly equiped and that said equipment was used and operated by the engineer of the locomotive drawing each of said trains to control the speed thereof.

VI.

That to allow the plaintiff herein to recover any judgment against the defendant herein, on account of the causes of action, or any thereof, alleged in said complaint, or to allow any finding to be made or collected herein, under and pursuant to the complaint herein, would be contrary to the provisions of said statute above referred to, known as the Safety Ap-

pliance Act, and the said order of the Interstate Commerce Commission, and would deprive the plaintiff of its property, without due process of law, and would be contrary to the provisions of article 5 of the amendments to the Constitution of the United States and contrary to the provisions of Section 1 of Article XIV, in addition to and amendatory of the Constitution of the United States.

VII.

That to allow any judgment to be rendered, had or recovered against said defendant herein, or to enforce the same against the said defendant, or to allow the said plaintiff to collect from the said defendant any moneys or any judgment, either in this action or this court, or by reason of any action brought in this court, upon the subject matter of this action, or to enforce any judgment thereon would be to deprive the said defendant of its property, without due process of law, and would be to deny the said defendant the equal protection of the laws, contrary to section 1 of Article [39] XIV, in addition to and amendatory of the Constitution of the United States.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant."

Whereupon the Court overruled the objections of the defendant and granted the motion of the plaintiff.

Whereupon the defendant duly excepted to the overruling of said objections of the defendant and excepted to the granting of the plaintiff's motion

for judgment on the pleadings, which exception is duly allowed by the Court.

Therefore, and upon said 19th day of July, 1916, judgment was entered in favor of the plaintiff against the defendant in the following language:

(Title of Court and Cause.)

Judgment.

"This matter coming on this day for hearing on the motion of Francis A. Garrecht, United States Attorney for the Eastern District of Washington, that judgment upon the pleadings be entered herein in favor of the plaintiff; the plaintiff being represented by the said United States Attorney, and the defendant, Great Northern Railway Company, appearing by Charles S. Albert, Esquire, its attorney, and the Court being fully advised in the premises, it is therefore

ORDERED and ADJUDGED that the defendant, Great Northern Railway Company, is hereby fined in the sum of twelve hundred dollars, being one hundred dollars for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that said plaintiff, United States of America, do have and recover of and from said defendant, Great Northern Railway Company, its costs and disbursements herein incurred, to all of which defendant duly excepted, which exception is allowed. [40]

Done in open court this 19th day of July, A. D. 1916.

FRANK H. RUDKIN,
Judge."

Whereupon the defendant duly excepted to the rendering and entering of the judgment in the above-entitled action, ordering and adjudging that the defendant be fined in the sum of twelve hundred dollars, and ordering and adjudging that the plaintiff have and recover from the defendant said sum and plaintiff's costs and disbursements pleaded and entered on the 19th day of July, 1916, and to said judgment, which exception is duly allowed by the Court.

Stipulation Re Evidence, etc.

IT IS HEREBY STIPULATED that the foregoing is conformable to the truth and contains all the evidence offered or introduced at the above-entitled action and also the findings of the Court in full and all objections, rulings, orders and all other proceedings had upon said trial, and that the same shall be settled and allowed as the settled case and bill of exceptions herein by the Honorable Frank H. Rudkin,, Judge of said court, without further notice.

(Signed) FRANCIS A. GARRECHT,
Attorney for Plaintiff.
CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

Order Settling Bill of Exceptions.

I hereby certify that the foregoing case and bill of exceptions has been examined by me and found conformable to the truth, and contains all the evidence offered or introduced on the trial of said cause, and also the findings of said Court in full,

and all objections, rulings, orders and all other proceedings had upon said trial, and I hereby settle and allow the same as the settled case and bill of exceptions herein.

Dated at Spokane, Washington, July 27, 1916.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[41]**

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

Defendant in the above-entitled cause feeling itself aggrieved by the findings of the Court and the judgment entered on the 19th day of July, 1916, comes now by Charles S. Albert and Thomas Balmer, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made, fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

[Endorsements]: Petition for Order Allowing Writ of Error. Due service of the within Petition by true copy thereof is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[42]**

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant and files the following assignment of errors, upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, from the findings and the judgment made by this Honorable Court on the 19th day of July, A. D. 1916, in the above-entitled cause:

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in overruling the objection of the defendant to the granting of plaintiff's motion upon the pleadings.

II.

That the said Court erred in granting the motion of the plaintiff for judgment in favor of the plaintiff upon the pleadings.

III.

That said Court erred in finding that the defendant was guilty of a violation of the Act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), which Act is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in Interstate Commerce to equip their cars with automatic couplers [43] and continuous brakes and their locomotives with driving-wheel brakes and for other purposes."

IV.

That said Court erred in ordering judgment to be entered herein and imposing a fine of one hundred dollars upon each cause of action, and twelve hundred dollars in all upon said defendant.

V.

That the said Court erred in ordering and rendering judgment herein in favor of the plaintiff and against the defendant for the sum of twelve hundred dollars, and the plaintiff's costs and disbursements therein.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed, and that said District Court be

directed to grant a new trial of said cause.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error, Defendant in the Lower Court.

[Endorsements]: Assignment of Errors. Due service of the within Assignment of Errors by true copy thereof, is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [44]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the United States of America, in full and just sum of two thousand dollars, to be paid to the United States of America, for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of July, 1916.

WHEREAS, lately at the April Term, A. D. 1916, of the District Court of the United States for the Eastern District of Washington, Northern Division,

in a suit pending in said court between the United States of America, plaintiff, and Great Northern Railway Company, defendant, a final judgment was rendered against said defendant, and the said defendant, Great Northern Railway Company, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America is about to be issued, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such that [45] if the said Great Northern Railway Company shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation be void; otherwise to remain in full force and effect.

(Signed) GREAT NORTHERN RAILWAY COMPANY.
By CHARLES S. ALBERT and
THOMAS BALMER,
Its Attorneys.
NATIONAL SURETY COMPANY.
By LESTER P. EDGE,
Resident Vice-president.
[Corporate Seal] F. S. JONES,
Resident Assistant Secretary.

Plaintiff is satisfied with the within bond and the surety thereon.

(Signed) FRANCIS A. GARRECHT,
Attorney for Plaintiff.

The foregoing bond is approved as to form, amount and sufficiency of surety this 27th day of July, 1916.

(Signed) FRANK H. RUDKIN,
Judge of the United States District Court, Eastern District of Washington.

[Endorsements]: Bond. Due service of the within Bond by a true copy thereof is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [46]

[Title of Court and Cause.]

Order Allowing Bond.

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the findings, decision and judgment thereon, made and entered herein, to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by the said

United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed.

NOW, THEREFORE, IT IS ORDERED that upon the said defendant, Great Northern Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of two thousand dollars, to the effect that if the said defendant, Great Northern Railway Company, plaintiff in error, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error [47] by the said United States Circuit Court of Appeals.

Dated this 27th day of July, 1916.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Bond. Due service of the within Order by a true copy thereof is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Defendant in Error. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [48]

At the stated term, to wit, the April Term, A. D. 1916, of the District Court of the United States of America of the Ninth Judicial Circuit, in and for the Eastern District of Washington, Northern Division, held at the courtroom in the city of Spokane, Washington, on the 27th day of July, in the year of our Lord 1916. Present, Honorable FRANK H. RUDKIN, District Judge.

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of Charles S. Albert and Thomas Balmer, Esq., attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors:

IT IS ORDERED that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be and hereby is fixed at two thousand dollars, which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this court, and which shall operate as a supersedeas bond and stay of execution is hereby granted, pending the determination of such writ of error.

(Signed) FRANK H. RUDKIN,
District Judge. **[49]**

[Endorsements]: Order Allowing Writ of Error. Due service of the within order by a true copy thereof is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[50]**

Citation on Writ of Error.

The President of the United States to the United States of America and FRANCIS A. GARRECHT, Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein the United States of America is plaintiff and you are defendant in error and the said Great Northern Railway Company is defendant and is plaintiff in error, and show cause if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th day of

July, A. D. 1916, and of the Independence of the United States the one hundred forty-first year.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division.

[Seal] Attest: (Signed) W. H. HARE,
Clerk.

[Endorsements]: Citation. Due service of the within Citation by a true copy thereof is hereby admitted at Spokane, Washington, this 27th day of July, A. D. 1916. (Signed) Francis A. Garrecht, Attorney for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, July 27, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[51]**

[Title of Court and Cause.]

Stipulation for Transcript of Record on Appeal.

IT IS HEREBY STIPULATED between the plaintiff by its attorney, and the defendant by its attorneys, that the transcript of the record on the writ of error in the above-entitled case shall be made up of the following papers:

1. Summons and Complaint.
2. Demurrer to the Complaint.
3. Stipulation of Facts.
4. Opinion of Court.
5. Judgment of Dismissal.
6. Mandate.
7. Answer.
8. A Motion for Judgment on the Pleadings.

9. Objections of the Defendant to the Granting of Said Motion.
10. Judgment.
11. Bill of Exceptions, dated July 27, 1916.
12. Petition for Writ of Error, dated July 27, 1916.
13. Assignment of Errors, dated July 27, 1916.
14. Bond on Writ of Error, dated July 27, 1916.
15. Order Allowing Bond, dated July 27, 1916.
16. Order Allowing Writ of Error, dated July 27, 1916.
17. Citation on Writ of Error, dated July 27, 1916.
18. Stipulation as to Making Up Record, dated July 27, 1916.
19. Writ of Error, dated July 27, 1916.
20. Praecipe, dated July 27, 1916.

Dated this 27th day of July, 1916.

(Signed) FRANCIS A. GARRECHT,
Attorney for Defendant in Error and Plaintiff.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error and Defendant.

[52]

[Endorsements]: Stipulation for Transcript. Filed in the U. S. District Court for the Eastern District of Washington, July 28, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [53]

Writ of Error.

The President of the United States of America to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the April Term, 1916, thereof, between the United States of America, plaintiff, and Great Northern Railway Company, defendant, a manifest error hath happened to the great damage of the Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 26th day of August next, in the said Circuit Court of Appeals to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 27th day of July, A. D. 1916 and the Independence of the United States the one hundred forty-first year.

[Seal] (Signed) W. H. HARE,
Clerk of the District Court for the Eastern District of Washington, Northern Division.

Allowed by:
(Signed) FRANK H. RUDKIN,
District Judge. [54]

[Endorsements]: Writ of Error. Service of the within writ of error and receipt of a copy thereof is hereby admitted this 27th day of July, 1916. (Signed) Francis A. Garrecht, Attorney for Defendant in Error. Filed in the U. S. District Court for the Eastern District of Washington, July 27th, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [55]

[Endorsed]: No. 2836. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 3, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

No. ——.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Stipulation for Printing Record Under Rule 23.

IT IS HEREBY STIPULATED by plaintiff in error, by its attorneys, and by defendant in error, by its attorney, that in printing the record in the above-entitled action the clerk shall cause the following to be printed for the consideration of the Court on appeal:

1. Complaint.
2. Answer.
3. Bill of Exceptions.
4. Petition for Writ of Error.
5. Assignment of Errors.
6. Bond on Writ of Error.
7. Order Allowing Bond.
8. Order Allowing Writ of Error.
9. Writ of Error.
10. Citation and Admission of Service.
11. Stipulation for Printing Record.
12. Stipulation as to Making Record.

And it is further stipulated, that in printing said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said title of court and said cause there be inserted in the place and instead thereof, the following words: "Title of Court and Cause."

Dated this 28th day of July, 1916.

CHARLES S. ALBERT and
THOMAS BALMER,

Attorneys for Plaintiff in Error and Defendant, Great Northern Railway Company.

FRANCIS A. GARRECHT,

Attorney for Defendant in Error and Plaintiff, United States of America.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Great Northern Railway Co., a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Stipulation for Printing.

No. 2836. United States Circuit Court of Appeals for the Ninth Circuit. Stipulation Under Rule 23. Filed Aug. 3, 1916. F. D. Monckton, Clerk.

No. 2836

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation.

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error.

Post Office Address:
Great Northern Passenger Station,
Spokane, Spokane County, Washington.

McKEE PRINTING CO., SPOKANE.

No. 2836

United States
Circuit Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation.

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

STATEMENT OF CASE

This case comes before this court upon a writ of error to the United States District Court for the Eastern District of Washington, Northern Division, from a judgment in favor of the United States against the Great Northern Railway Company, imposing a penalty of twelve hundred dollars ($1200). The action was brought upon twelve counts, to recover penalties under the Safety Appliance statutes. The defendant demurred to the plaintiff's complaint. This demurrer was sustained by Judge Rudkin, whereupon a writ of

error was taken to the Circuit Court of Appeals of the Ninth Circuit, the judgment of dismissal entered upon the demurrer was reversed by a divided court, and the case sent back for further proceedings. (*U. S. vs. G. N. Ry. Co.*, 229 *Fed.* 929). Defendant thereupon answered and the plaintiff moved for judgment on the pleadings. Judge Rudkin granted the motion and judgment was entered for the plaintiff in the sum of twelve hundred dollars ($1200) with costs and disbursements. From this judgment the Great Northern Railway Company has sued out a writ of error.

STATEMENT OF FACTS

The facts are to be gathered from the complaint and answer. All the facts inconsistent with the answer, must be resolved in favor of the defendant railway company as not established.

The complaint consisted of twelve causes of action, and related to the movement of twelve trains during July, 1914, it being alleged that these trains were moved in violation of the Safety Appliance Act. The facts admitted in the answer and which are not disputed, show that defendant was engaged in interstate commerce at the time of the movement of the trains in question, and that the trains were moved in such commerce. The plaintiff by the motion for judgment on the pleadings, admitted that paragraph 3 of the answer was true. This paragraph establishes that "each engine upon each of said trains was equipped with

power driving wheel brakes and appliances for operating a train brake system, and that in each train not less then 85% of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes." (Tr. p. 17).

The defendant denied that it had violated the Safety Appliance Act. The allegations of the complainant that the defendant required the brakemen to use the common hand brake to control the speed of the train, and that the speed of the train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, are inconsistent with the allegation of paragraph 3 of the answer, and consequently must be taken as not proven.

ASSIGNMENT OF ERRORS

The following errors specified as relied upon, and each of which is asserted in this brief and intended to be urged, are the same as those set out in the assignment of errors appearing in the printed record.

1. That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in overruling the objection of the defendant to the granting of plaintiff's motion upon the pleadings.

2. That the said Court erred in granting the motion of the plaintiff for judgment in favor of the plaintiff upon the pleadings.

3. That said Court erred in finding that the defendant was guilty of a violation of the Act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), which Act is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in Interstate Commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes."

4. That said Court erred in ordering judgment to be entered herein and imposing a fine of one hundred dollars upon each cause of action, and twelve hundred dollars in all upon said defendant.

5. That said Court erred in rendering judgment herein in favor of the plaintiff and against the defendant for the sum of twelve hundred dollars, and the plaintiff's costs and disbursements herein. (Tr. p. 26).

QUESTION INVOLVED

The sole question involved is whether the Railway Company, after equipping its trains as required by the Safety Appliance Act and using and operating the power or train brakes to control the speed thereof, could use the hand brakes in connection with the power or train brakes.

The defendant in the court below objected to the granting of the motion for judgment on the pleadings, on the grounds that no cause of action was shown under the Act of Congress known as the Safety Appliance Act, its amendments, and the regulations promulgated in pursuance thereof; that to allow a recovery would deprive the defendant of its property without due process of law, and would be contrary to the provisions of Article 5 and Section 1 of Article 14 of the Amendments to the Constitution, of the United States, and would deny the defendant the equal protection of the laws, contrary to Section 1 of Article 14, of the Amendments; that it was shown that the defendant had fully equipped its locomotives and cars, and that the statutes and order of the Commission did not prohibit the use of hand brakes for the purpose of controlling the speed of trains; that the complaint did not charge a violation of the Safety Appliance Act or order of the Interstate Commerce Commission, nor did it charge that a sufficient number of the cars in the train were not equipped with power or train brakes, to enable the engineers to control the speed,

without requiring brakemen to use the hand brakes for that purpose; that it appeared from the pleadings that the trains in question were properly equipped, and that said equipment was used and operated by the engineer of the locomotive drawing each of said trains to control the speed thereof. (Tr. 20-22).

There is clearly involved the construction and application of the Constitution of the United States, the determination of a Federal question, and the application of a Federal statute. The amount in controversy exceeds the sum of one thousand dollars,—to-wit, twelve hundred dollars. The question here involved has not been decided by the Supreme Court of the United States. The decisions in the B. & O., Virginian and Great Northern cases (hereinafter cited) are inconsistent. In the interest of uniformity of decision there should be a final determination by the Supreme Court of the United States. The question to be determined is one of gravity and importance, involving as it does, under the contention of the government, the abolition entirely of men from the top of cars.

ARGUMENT

I.

THE BRAKEMEN WERE NOT REQUIRED TO USE THE HAND BRAKE TO CONTROL THE SPEED OF THE TRAIN, AND CONSEQUENTLY NO VIOLATION OF THE SAFETY APPLIANCE ACT ACT HAS BEEN SHOWN.

This case was before this court upon a writ of error from a judgment of dismissal entered after the sustaining of defendant's demurrer to the complaint. In

the decision of the majority of this court it was held that Congress had intended to dispense with the use of men on the top of the cars, and upon this theory the case was reversed. This is shown by the excerpts from the reports of the house committees and Interstate Commerce Reports. The phrases "dispense with the use of men on top of the cars," "so that men who are on the top of the cars will be taken off and thereby relieved from the danger of such position," "men will not be obliged to use the tops of the cars for braking," indicate the basis of the majority opinion.

U. S. vs. G. N. Ry. Co., 229 Fed. 929.

The act itself as construed in the majority opinion provides that the train should be sufficiently equipped to be run "without requiring brakemen to use the common hand brake."

It was not shown upon the trial, either that the trains in question were not equipped so that they could be run "without requiring brakemen to use the common hand brake," or that brakemen were required to be upon the top of cars.

The decision of the motion for judgment on the pleadings must rest upon the admission of the truth of all of the allegations of the answer and every reasonable intendment therefrom, and the allegations of the complaint can be held to be sustained only in so far as admitted by the answer. The complaint alleged, that in violation of the Safety Appliance Act, the defendant ran trains when the speed thereof "was con-

trolled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used or operated by the engineer of the locomotive drawing such train." (Tr. p. 2).

The defendant, by its answer, admitted the movement of the trains and the interstate commerce character thereof. It then alleged: "Each engine upon each of said trains was equipped with power driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85% of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. Said defendant specifically denies that the Act of Congress mentioned in the complaint herein, as amended, was violated by the said defendant, and denies that said defendant is liable to the said plaintiff." (Tr. 17).

The sole effect of this answer, so far as it relates to the handbrake, is that the train was properly equipped with power driving wheel brakes and apliances, and at least 85% of the cars were equipped with power or train brakes; that these were used and operated by the engineers to control the speed of the trains "in connection with the hand brakes." The violation of the Safety Appliance Act was specifically denied, as was also any liability to the plaintiff on account of such

violation. The case is in a different situation than it was upon the prior hearing, for the reason that upon that hearing the sufficiency of the complaint and every reasonable intendment therefrom had to be admitted by the defendant,—with a stipulation of facts to be used to assist in the construction of the complaint. Here the allegations of the complaint are denied, and the stipulation which is embodied in the answer, must be construed most favorably to the defendant. The theory upon which the majority opinion rested upon the previous hearing was that Congress had intended to dispense with the use of brakemen upon the top of cars, and that brakemen were required to use the common hand brakes to control the speed of the train. The only allegation which can now be considered in that connection is that the power or train brakes "were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes." There is no admission here, either that brakemen were used upon the top of the cars or that brakemen were required to use the common hand brakes to control the speed of the train. For all that appears from the pleadings, the brakes may have been set before the cars were moved, in which event neither of the situations as outlined in the majority opinion, existed; that is, that brakemen were required to use the common hand brakes, or that they were upon top of cars using such brakes in connection with the control of the speed of the train. For this reason the judgment should be reversed, and the cause remanded, with instructions to enter a judgment for the defendant.

II.

THE SAFETY APPLIANCE ACT DID NOT PROHIBIT THE USE OF HAND BRAKES IN CONNECTION WITH THE CONTROL OF THE SPEED OF THE TRAIN.

The trains were equipped and the brakes used and operated, as required by the act, and there was no violation for which a penalty should be imposed. The original Safety Appliance Act declares:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brakes for that purpose."
>
> (Safety Appliance Act approved March 2, 1893, chap. 196, 27 St. at L., 531, as amended by Act of April 1, 1896, chap. 87, 29 St. at L., p. 85).

This act was subsequently amended by Section 2 of the Act of March 2, 1903, which provided:

> "That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train and all power-brake cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the object of said

> Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission, shall be subject to the like penalty as failure to comply with any requirement of this section."
>
> (Act of March 2, 1903, chap. 976, 32 St. at L., 943).

Pursuant to this amendment the Interstate Commerce Commission on the 6th day of June, 1910, promulgated the following order:

> "It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in each such train which are associated together with the 85 per cent shall have their brakes so used and operated."

The Safety Appliance Act was further amended in 1910, as follows:

> "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps *and efficient hand brakes;* all cars

> requiring secure ladders and secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."
>
> (Sec. 2, chap. 160, Act of April 14, 1910, 36 St. at L., 298).

There is no claim by the government that the trains were not properly equipped, as required by the act and the order of the Interstate Commerce Commission, nor that the brakes were not used and operated by the engineers of the locomotives drawing the trains. The government's contention is that in controlling the speed of the train, brakemen were on top of the cars and used hand brakes for that purpose. The act of April 14, 1910, clearly contemplates the use of hand brakes, for the act provides "all cars must be equipped with secure sill steps and *efficient hand brakes.*" All that the statute requires is equipment and use and operation of 85% efficiency by the engineer. This is admitted by the government. The act of 1893 requiring a sufficient number of cars to be so equipped that the engineer can control the speed without requiring brakemen to use common hand brakes, was in conflict with the later act of Congress of 1903, providing that not less than 50% of the cars shall have their brakes used and operated by the engineer, and providing that

the Interstate Commerce Commission might increase this percentage. The statute cannot be enlarged by implication to extend it to cases not within its words and purport. There is nothing in the statute, either expressly or by implication, prohibiting the use of hand brakes in connection with the power brake system. The full percentage required by the statute and the order of the Interstate Commerce Commission were equipped. This court has no power to hold that a larger percentage of cars should have been equipped and operated than is required by the act and the order of the Commission, for to do so would assume the function devolved upon Congress by the Interstate Commerce Commission.

U. S. vs. G. N., 229 Fed. 932, (dissenting opinion of Judge Ross).

The indefiniteness of a "sufficient" number of cars was made certain by the act of 1903 in giving a percentage which should be equipped, used and operated. It is not left to the construction of an indefinite word to fix the obligation of the carrier. Authority was given the Commission to increase this percentage, which it did by various increase from 50% to 75% and then to 85%. If the Interstate Commerce Commission desires to make any change with reference to this percentage, it has authority under the act to do so. The Commission has exercised its prerogative in granting full hearings, and after such hearings fixing the standard upon which the railroads could operate, not sub-

jecting them to constant vacillation as to the correct number of cars to be equipped.

The pleadings do not show that the trains could not be controlled by the use of the air brake equipment, but on the contrary show that power or train brakes were used and operated to control the speed of the trains in connection with the hand brakes. The charge made in the complaint was that the speed was controlled by the brakemen using the common hand brake for that purpose, and when the speed was not controlled by the engineer of the locomotive. This is entirely negatived by the allegation of paragraph 3 of the answer, so that there is no offense even as claimed in the complaint, shown in this action. It was not a violation of the act to actually control the speed of the train by the use of hand brakes, or to use hand brakes to assist in the control of the speed; provided that at all times the train was so equipped that it could be controlled by the use of the air brakes with which it was equipped. The requirement of Congress of the equipment of cars with hand brakes evidences an intention on the part of Congress that such hand brakes be used. The only way that the prohibition against the use of hand brakes can be sustained is to read into the act words which are not there. There is no provision in the act requiring cars to be isolated before hand brakes are added. That there was no intention on the part of Congress to prohibit the use of hand brakes is shown by the absence of such a prohibition from every statute on the subject.

This act is unambiguous, and it is not necessary to resort to extraneous matters to gather the intention of the act. This can be gathered by the words themselves.

The act was passed "to promote the safety of employes and travelers upon railroads." (Title). With this purpose in view, the use of hand brakes to effectuate the purpose was not prohibited, and that it was the purpose to use the hand brakes is evident from the provision of the act requiring all cars to be equipped with them. Even with a full 100% equipment and use and operation of power or train brakes, the additional use of hand brakes might promote the safety of the trains, including the employes and travelers thereon. It was clearly not intended to take away this additional safety provision. The contention that the hand brakes can be used only when the cars are segregated is not reasonable. The act contains no such provision. It requires all cars to be equipped with efficient hand brakes, and it would be a clear violation of the act if the cars were quipped so that the hand brakes on cars could be used only when segregated from the train, and could not be used when associated in the train.

The claim that the words "without requiring brakemen to use the common hand brake" should be construed in the same way as the words, in another portion of the statute, "without the necessity of men going between the ends of the cars," is neither sound nor in accordance with the act. Proof of the fact that hand

brakes were used on the cars would not be evidence that the trains were not properly equipped with the requisite number of power brake cars. The test of compliance with reference to the coupling provision is whether men must go between the cars to couple or uncouple them. The act does not prohibit them from doing so. They must go in for other purposes. Proof of the fact that men go between the cars would not be proof that the couplings were not such as were required by the act. So here, proof that the hand brakes were used, would not be proof that the trains were not properly equipped with the power or train brakes.

U. S. vs. B. & O. Ry., 176 Fed. 114.
U. S. vs. B. & O Ry., 185 Fed. 46.

The coupler provision contains no requirement that any coupler shall be provided, other than the automatic coupler, while the train brake provision actually requires that the cars be equipped with hand brakes. If cars were required to be equipped with other couplers besides the automatic couplers it might reasonably be inferred that such couplers were intended to be used under some circumstances.

The requirement that hand brakes must be provided on all cars in interstate trains, shows that they are intended to be used on such trains under some circumstances.

"The statute should have a sensible construction, and its general purpose may be effected without adopting a view so harsh and onerous, primarily to the rail-

road company, but ultimately to the public, upon whom the burden of expense must finally rest. The purpose undoubtedly was to protect the lives, both of passengers and of employes, and also to safeguard the freight in transit."

U. S. vs. C. M. & St. P. Ry., 219 Fed. 1011.

Equipment only is the required thing, and not the proper manipulation of that equipment by the employes.

U. S. vs. Ill. Cent. Ry., 156 Fed. 192.
Missouri Pacific Ry. Co. vs. U. S., 211 Fed. 893.
Lyon vs. Charleston & W. C. Ry. Co., 56 S E. 18.
Thornton Employer's Liability and Safety Appliance Act, Sec. 191.

The Virginian case (U. S. vs. Virginian Ry., 223 Fed. 748) neither sustains nor controls the decision here, the contention of the government. In that case the trains were controlled solely by the use of hand brakes and the power brakes were not used at all. In any event, the court's holding was based on the position that in a penal statute a prohibition may be implied, which is not the law. Judge Ross in his dissenting opinion on the previous hearing of this case, clearly distinguished the Virginian case.

U. S. vs. G. N. Ry., 229 Fed. 933.

CONCLUSION

In order to sustain the government's contention in this case it is necessary to add to the Safety Appliance Act a qualifying clause "provided that 85% of the cars

so operated was sufficient to control the speed of the train." The grammatical construction of section 1 of the 1893 act demonstrates that the word "sufficient" is qualified by the words "without requiring brakemen to use the common hand brakes." Had it been intended to prohibit the use of hand brakes entirely in the control, a phrase would have been added "and the speed of such train shall not be controlled by the use of common hand brakes." No such prohibition is contained in the act, and the act relates entirely to an offense consisting of failure to "equip." There was for three reasons no inhibition against the use of hand brakes or brakemen using them; first, because the phrase as originally inserted was a criterion to determine the amount of proper equipment with reference to the word "sufficient;" second, this amount having been made definite by the amendment of 1903, the necessity for using it as a measure was gone; third, the prohibition was against the lack of equipment and not against the additional control.

The question in this case is not whether Congress should have prohibited the use of hand brakes, but whether Congress did do so. It involves the construction of plain words in a plain act,—an act which does not contain any such prohibition. To quote the words of the majority opinion upon the previous hearing, substituting the word "hand" for "power," "to say that trains shall be provided with hand brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the

act." We have provided the train with power brakes; we have not refused to use them, but it is expressly admitted that we did use them; we are compelled to equip our train with hand brakes and we have not refused to use them, but did use them. Certainly this cannot be construed to be a contradiction of the purpose and terms of the act.

The government's position is not that we have failed to do that which Congress has required us to do, but that we have been guilty of a violation of the act in using all of the facilities which Congress requires us to use. It claims an implied prohibition in a penal statute, in which there is no prohibition, either express or implied, against using hand brakes as an additional precaution for safety.

Clearly, there was no offense, either under a strict or liberal construction of the act, and no penalty should be imposed, where even under the government's claim or the construction placed upon the act by the majority opinion, it was not shown that brakemen were upon the top of the cars, or that brakemen were required to use common hand brakes. The admitted facts show only that the power or train brakes were used and operated by the engineer of the locomotive drawing the trains, to control the speed, in connection with the hand brakes. This is contrary to the charge made in the complaint, and does not show an offense for which a penalty can be imposed under the act. The judgment

should be reversed, with instructions to enter a judgment for the defendant.

Respectfully submitted,

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error.

No. 2836.

United States Circuit Court of Appeals for the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

FRANCIS A. GARRECHT,
United States Attorney.
PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1916

United States Circuit Court of Appeals for the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, plaintiff in error, *v.* THE UNITED STATES OF AMERICA, defendant in error.	No. 2836.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case, which has heretofore been before this court (*United States* v. *Great Northern Railway Company*, 229 Fed. 927), is a prosecution in twelve counts under the Safety Appliance Acts (27 Stat. at L. 531; 29 Stat. at L. 85; 32 Stat. at L. 943; 36 Stat. at L. 298).

It now comes before the court on writ of error to the United States District Court for the Eastern District of Washington, Northern Division, for a judgment in favor of the United States against the Great Northern Railway Company in which there was a judgment in favor of the Government of one hundred dollars ($100) on each of the twelve causes of action.

62451—16——1

The material part of the complaint in each cause of action is as follows (Rec. p. 2):

Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid act of March 2, 1893, as amended.

To this complaint defendant demurred, which demurrer was sustained by the District Court, but the judgment entered upon the demurrer was reversed by this court (229 Fed. 927). After the case was remanded the defendant railway company filed its answer (rec., p. 16), the material part of which is as follows :

Said defendant further alleges that each engine upon each of said trains was equipped with a power-driving wheel brake and appliances for operating the train-brake system, and that in each train not less than 85 per cent of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing

such train, to control its speed in connection with the hand brakes.

The plaintiff moved for judgment on the pleadings, to which defendant entered seven formal objections (rec., p. 20), setting forth in different form of words its claim that no cause of action in favor of the plaintiff is shown by the pleadings.

The sixth and seventh objections set forth the claim that to allow recovery of judgment against the defendant on account of any of the causes of action alleged in the claim would be contrary to the provisions of article 5 of the amendments of the Constitution of the United States and contrary to the provisions of section 1 of article 14. To the overruling of the objections of the defendant and the granting of the motion of the plaintiff for judgment on the pleadings the defendant excepted. (Rec., p. 22.)

The defendant filed the following assignment of errors (Rec., pp. 26 and 27):

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in overruling the objection of the defendant to the granting of plaintiff's motion upon the pleadings.

II.

That the said court erred in granting the motion of the plaintiff for judgment in favor of the plaintiff upon the pleadings.

III.

That said court erred in finding that the defendant was guilty of a violation of the act of Congress known as the "Safety Appliance Act," approved March 2, 1893 (contained in 27 Statutes at Large, p. 531), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, p. 85), as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, p. 943), which act is entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."

IV.

That said court erred in ordering judgment to be entered herein and imposing a fine of one hundred dollars upon each cause of action, and twelve hundred dollars in all upon said defendant.

V.

That the said court erred in ordering and rendering judgment herein in favor of the plaintiff and against the defendant for the sum of twelve hundred dollars, and the plaintiff's costs and disbursements therein.

QUESTIONS INVOLVED.

1. Is there Constitutional Objection to the Validity of the Prohibition in the Statute Against Requiring Brakemen to use the Com-

MON HAND BRAKE FOR THE PURPOSE OF CONTROLLING THE SPEED OF TRAINS?

2. WAS PLAINTIFF ENTITLED TO JUDGMENT ON THE PLEADINGS?

3. DOES THE "LAW OF THE CASE," ESTABLISHED BY THE FORMER JUDGMENT OF THIS COURT, FORBID A RECONSIDERATION OF THE QUESTION CONSIDERED AND DETERMINED BY THIS COURT SO THAT NO ERROR CAN BE ALLEGED IN THE ACTION OF THE COURT BELOW TAKEN IN ACCORD WITH THE MANDATE OF THIS COURT?

I.

IS THERE CONSTITUTIONAL OBJECTION TO THE VALIDITY OF THE PROHIBITION IN THE STATUTE AGAINST REQUIRING BRAKEMEN TO USE THE COMMON HAND BRAKE FOR THE PURPOSE OF CONTROLLING THE SPEED OF TRAINS?

To the constitutional objections urged against the validity of the requirement of the statute that brakemen shall not be required to go on the top of the cars to operate the hand brakes, it is only necessary to say that this is no violation of the fifth article of amendment to the Constitution, and the first section of article 14 is not applicable to congressional legislation, being in express terms limited to action by the States.

The fifth article is not violated, because legislation under the commerce clause directed in the

interest of the safety of travelers and employees has long been held to be constitutional.

Southern Railway Co. v. *United States*, 222 U. S. 20.

Second Employers Liability Cases, 223 U. S. 1.

Wabash R. R. Co. v. *United States*, 168 Fed. 1.

Legislation coming within the scope of regulation of commerce among the States is not impaired by the due process clause of the fifth amendment.

Chicago, Burlington & Quincy R. R. Co. v. *McGuire*, 219 U. S., 540.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 228.

Patterson v. *Bark Eudora*, 190 U. S. 174.

Atlantic Coast Line Co. v. *Riverside Mills*, 219 U. S. 186.

Louisville & Nashville Railroad Co. v. *Mottley*, 210 U. S., 467.

Laws enacted in the exercise of the power to regulate commerce are not violative of property rights protected by the Federal Constitution.

The power of Congress to regulate in the interest of safety the instrumentalities of interstate commerce involves the right to declare the liability which follows the infraction of such regulations as that body may enact.

The due-process clause of the fifth amendment does not restrain the normal exercise of governmental power.

The regulation in the interest of safety made in the safety appliance acts is a normal and constitutional exercise of congressional power.

The power of Congress to regulate interstate commerce "is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it." *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

Regulations to promote safety of citizens' lives can not be held to be a taking of "life, liberty, or property" in violation of the due-process clause of the Constitution.

II.

WAS PLAINTIFF ENTITLED TO JUDGMENT ON THE PLEADINGS?

Judgment on the pleadings was properly rendered in favor of the United States for the reason that there was not set forth in the answer or plea any substantial and issuable defenses to the allegations of the plaintiff's declaration. All the material allegations stated in the declaration were left without denial. The allegations of the answer set forth no defense to the allegations of the declaration. These allegations, standing uncontested and unchallenged, constituted a lawful basis for judgment on the pleadings for the plaintiff.

III.

DOES THE "LAW OF THE CASE," ESTABLISHED BY THE FORMER JUDGMENT OF THIS COURT, FORBID A RECONSIDERATION OF THE QUESTION CONSIDERED AND DETERMINED BY THIS COURT SO THAT NO ERROR CAN BE ALLEGED IN THE ACTION OF THE COURT BELOW TAKEN IN ACCORD WITH THE MANDATE OF THIS COURT?

On the substantive question of law involved in this case, which the carrier's brief, page 5, speaks of as "the sole question involved," there was no discretion in the court below as to the judgment to be rendered.

The former decision of this court in this case (229 Fed. 927) established the "law of the case," which it became the imperative duty of the district court to obey. When this cause was remanded by this court to the court below for further proceedings it became the duty of the court below in the further proceedings to conform to the opinion laid down by this court.

There can be no error in the district court following the mandate of the Circuit Court of Appeals. The rule as to "the law of the case" is applicable not only to the lower court but to the appellate court itself, when the same question again arises in the same case.

This court in *Mathews* v. *Columbia National Bank*, 100 Fed., at page 397, said:

> In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the States, a second writ of error,

or a second appeal in the same case, brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error. *Bridge Co.* v. *Stewart*, 3 How. 413, 425, 11 L. ed. 638; *Sizer* v. *Many*, 16 How. 98, 14 L. ed. 861; *Tyler* v. *Magwire*, 17 Wall. 253, 283, 21 L. ed. 576; *Phelan* v. *City and County of San Francisco*, 20 Cal. 39, 44; *Leese* v. *Clark*, Id. 387, 416, 417. Mr. Justice Field, in the last case, speaking of the reasons for this doctrine, said:

"The Supreme Court has no appellate jurisdiction over its own judgments. It can not review or modify them after the case has once passed, by the issuance of the remittur, from its control. * * * The decision is no longer open for consideration. Whether right or wrong it has become the law of the case. This will not be controverted. * * * It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone.

"*And if a new trial is had in accordance with its decision, no error can be alleged in the action of the court below. Young* v. *Frost*, 1 Md. 394; *McClellan* v. *Crooks*, 7 Gill. 338."

In *Standard Sewing Machine Co.* v. *Leslie*, 118 Fed., at p. 559, Baker, circuit judge, delivering the opinion of the Seventh Circuit Court of Appeals, said:

"* * * it is a familiar and entirely righteous rule that a court of review is pre-

> cluded from agitating the questions that were made, considered, and decided on previous reviews. The former decision furnishes 'the law of the case,' not only to the tribunal to which the cause is remanded, but to the appellate tribunal itself on a subsequent writ of error or appeal. *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L. ed. 969. 'There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate on chances from changes in its members.'"

Other cases in which the doctrine of "the law of the case" was applied are:

> Eighth Circuit Court of Appeals, *Mutual Reserve Fund Life Assn.* vs. *Ferrenbach*, 144 Fed. 342, 343.
>
> Fourth Circuit Court of Appeals, *Patton* v. *Texas & Pacific Railway Co.*, 95 Fed. 244.

No question is suggested in the specifications of error or in the argument made in the brief of the plaintiff in error which in any manner distinguishes the present case from that heretofore determined by this court. The constitutional questions suggested to the court below, but not referred to in the specifications of error or in the carrier's brief, do not constitute such a change in the question involved. These constitutional questions could have been availed of for the purpose of taking the case directly to the Supreme Court, but this was not done nor was there any specification of error based upon any of these questions.

For the purposes of this case these constitutional questions may be assumed to have been abandoned. Nothing therefore remains but the question admitted to be the sole question of the case by the plaintiff in error, which question is foreclosed by the decision of this court in the former case, 229 Fed. 927.

Wherefore, it is respectfully submitted that the judgment of the lower court should be affirmed.

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